95-450

NO.____

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IN THE

Supreme Court Of The United States

October Term, 1995

ORIX CREDIT ALLIANCE, INC.,
Petitioner,

v.

DELTA RESOURCES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 506(b) of the Bankruptcy Code recognizes a right to postpetition interest. The question presented is the following:

Are bankruptcy courts precluded, as a matter of law, from entering an order for the payment of postpetition interest as a part of the "adequate protection" of an oversecured creditor's "interest in property"?

INFORMATION REQUIRED BY RULE 29.6

Petitioner, ORIX Credit Alliance, Inc., is a corporation incorporated under the laws of the State of New York, and its principal place of business is located in Secaucus, New Jersey. Petitioner's ultimate parent company is the ORIX Corporation, a corporation publicly traded in the Republic of Japan. Petitioner does not have any nonwholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

ORIX Credit Alliance, Inc. (ORIX), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 54 F.3d 722 and is reproduced in the appendix at pages 1-18. The opinion of the district court is not officially reported and is reproduced in the appendix at pages 21-26. The order of the bankruptcy court is not officially reported and is reproduced in the appendix at pages 29-32.

JURISDICTION

The court of appeals entered its judgment on June 14, 1995. App. 19-20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are Sections 361, 362(d)(1) and 506(b) of the Bankruptcy Reform Act of 1978, as amended, which is codified at 11 U.S.C. § 101 *et seq.* Section 361 provides as follows:

11 U.S.C. § 361. Adequate Protection

> When adequate protection is required under Sections 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by —
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under Sections 362 of this title, use, sale, or lease under Section 363 of this title, or any grant of a lien under Section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under Section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Section 362(d)(1) provides, in part, as follows:

11 U.S.C. § 362. Automatic Stay

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

Section 506(b) provides as follows:

11 U.S.C. § 506. Determination of Secured Status

> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

STATEMENT OF THE CASE

Petitioner, a creditor holding a valid lien on collateral with a value in excess of the amount of the debt, filed a motion for relief from stay in respondent's bankruptcy case. The bankruptcy court ordered monthly adequate protection payments measured solely by the straight-line depreciation of petitioner's collateral; the district court reversed and ordered that the bankruptcy court award monthly adequate protection payments that include accrued interest; the court of appeals reversed the district court's order. All three courts agree that an oversecured creditor such as petitioner has a statutory right to postpetition interest; the courts differ as to when that interest can be paid and, if payment is delayed, whether an oversecured creditor can be provided with adequate protection of its right to postpetition interest.

Throughout these proceedings, petitioner has advanced two contentions: First, under Section 506(b) of the Bankruptcy Code, petitioner, as an oversecured creditor, is entitled to postpetition interest. Second, under Section 362(d)(1) of the Bankruptcy Code, petitioner is entitled to adequate protection of that statutory right to interest. The evidence is undisputed that petitioner's postpetition interest is $8,292.90 per month. R1-5, Ex. 27; R1-1-Tr.36.

A. Proceedings In The Bankruptcy Court.

On November 30, 1992, Respondent, Delta Resources, Inc. (Delta), filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the United States Bankruptcy Court for the Northern District of Alabama. Petitioner holds a perfected security interest in respondent's accounts receivable, equipment, general intangibles and other property. App. 22. Invoking the bankruptcy court's jurisdiction under 28 U.S.C. § 157, petitioner sought relief from the automatic stay with the bankruptcy court pursuant to Section 362 of the Bankruptcy Code. App. 2. Petitioner argued, inter alia, that its perfected security interest in respondent's equipment collateral "was not adequately protected." App. 29. Respondent, as a debtor-in-possession, opposed the motion. App. 2, 22.

The bankruptcy court denied the motion and entered its order disposing of petitioner's request for relief. App. 29-32. The court stated that "this dispute is a matter of providing adequate protection for this oversecured creditor's interest until the debtor's Chapter 11 plan can provide a more permanent remedy." App. 29. The bankruptcy court found that petitioner's "secured interest in its collateral will be adequately protected by periodic cash payments." App. 32. The bankruptcy court ordered respondent to pay petitioner $9,972.41 per month, be-

ginning on April 1, 1993. This payment amount equals accruing depreciation only. App. 31-32. The bankruptcy court stated that the postpetition interest issue "should be dealt with at the time of confirmation of the debtor's Chapter 11 plan." *Id.* Petitioner appealed the bankruptcy court's order to the United States District Court for the Northern District of Alabama.

B. Proceedings In The District Court.

The district court reversed the bankruptcy court's decision. App. 21-28. The court found that petitioner was an "oversecured creditor" because "the value of the collateral exceeded the debt." App. 23. The court stated that (i) "[a]s an oversecured creditor, Credit Alliance [ORIX] is entitled to postpetition interest under 11 U.S.C. § 506(b)," (ii) "[a]s this interest accrues it also becomes secured by the security interest held by the creditor in the property," (iii) "the equity cushion is small, only $57,160.64" and (iv) "[t]he payments ordered by the bankruptcy court would offset the future depreciation in the value of the collateral but would not protect Credit Alliance from damage to the security cushion engendered by the accruing interest." App. 24.

Relying on this Court's decision in *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), the court held that petitioner was entitled to postpetition interest during the stay period as part of adequate protection. App. 25. The court remanded the case to the bankruptcy court with instructions that the court "order monthly adequate protection payments of $18,264.31 (bankruptcy court determined monthly depreciation of $9,972.41 plus $8,292.90 monthly postpetition interest) be paid by Delta Resources, Inc. directly to Credit Alliance retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench

denying relief from stay." App. 28. Respondent then appealed to the court of appeals.

C. Proceedings In The Court of Appeals.

The court of appeals reversed. *ORIX Credit Alliance, Inc. v. Delta Resources, Inc.*, 54 F.3d 722 (11th Cir. 1995). App. 1-18. The court stated that "[t]he question before us is not whether an oversecured creditor whose collateral is worth more than the amount of its debt in a Chapter 11 bankruptcy case may obtain postpetition interest as part of its claim." App. 10. The court correctly stated that "it seems beyond peradventure that a creditor's right to recover postpetition interest on its oversecured claim pursuant to 11 U.S.C. § 506(b) is virtually 'unqualified.'" App. 10 (quoting *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989)). Respondent agreed. *See* App. 11 ("Delta does not dispute that an oversecured creditor is entitled to postpetition interest on its claim"). The court framed the sole issue presented as whether oversecured creditors such as petitioner are "entitled to receive periodic cash payments for accruing postpetition interest as part of adequate protection, pursuant to 11 U.S.C. § 362(d)(1)," during the stay period. App. 10-11.[1]

The court held that "ORIX, as a matter of law, was not entitled to receive periodic payments for accruing

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[1]The court of appeals stated that the bankruptcy court "did not find whether ORIX in fact was an oversecured creditor. Instead, the court merely assumed, as ORIX had asserted, that ORIX was an oversecured creditor." App. 2-3. The court's statement is mistaken. Both the bankruptcy court and the district court found that petitioner was an oversecured creditor. App. 11, 23, 29. The record fully supports those findings. *See* R1-1-Tr.-15, 33, 138-44, 181. In any event, the court of appeals treated petitioner as an oversecured creditor throughout its opinion, and the court's decision applies to *all* oversecured creditors in bankruptcy cases, not just to petitioner. App. 17.

postpetition interest as part of adequate protection for any period of time" during the stay period or prior to "the completion of reorganization or confirmation of the bankruptcy case." App. 16-17. The court reasoned that "11 U.S.C. § 506(b), providing for postpetition interest on oversecured claims, read *in pari materia* with 11 U.S.C. § 362(d)(1), concerning conditioning the automatic stay on adequate protection, and 11 U.S.C. § 502, regarding the allowance of claims, requires that the payment of accrued postpetition interest to an oversecured creditor await the completion of reorganization or confirmation of the bankruptcy case." App. 16. The court, therefore, reversed the district court's order awarding adequate protection payments to the extent that such payments included postpetition interest. App. 18.

REASONS FOR GRANTING THE WRIT

The court of appeals erroneously answered important and complex questions of bankruptcy law that will recur with regularity in business and consumer bankruptcy cases involving an oversecured creditor. By concluding that the Bankruptcy Code requires that payment of postpetition interest to oversecured creditors await the completion of the bankruptcy, with the result that adequate protection cannot include periodic payments of accrued postpetition interest, the court of appeals has fundamentally changed the practical administration of bankruptcy cases and the settled expectations of creditors. These rulings are also inconsistent with the Bankruptcy Code, with this Court's reasoning in *United States Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988), and with the orders of many lower courts. Accordingly, the decision below warrants review by this Court at this time, even though at present there is no direct conflict among the circuits on the question presented.

I. The Question Presented Is Important.

Questions relating to the payment of postpetition interest in bankruptcy are important because bankruptcy cases take so long and because the ultimate outcome of a bankruptcy case and the ultimate distributions to creditors are so unpredictable. Six recent studies report the *median* time between the filing of a bankruptcy petition and the confirmation of a plan of reorganization is from 17 to 32 months. *See* Lynn LoPucki, *The Trouble With Chapter 11*, 1993 Wis. L. Rev. 729, 759. A statistical analysis by the Administrative Office of the United States Courts estimates that only 17% of Chapter 11 cases ever result in a confirmed plan of any kind.[2] Therefore, the question presented by the court of appeals' decision will arise with the degree of regularity necessary to justify review by this Court. Indeed, this Court has recognized the importance of postpetition interest by granting certiorari and deciding three cases that involved questions of which categories of creditors have a right to postpetition interest. *Timbers, supra; Ron Pair, supra; Rake v. Wade,* 113 S.Ct. 2107 (1993).

Unquestionably, oversecured creditors have a right to postpetition interest. The Bankruptcy Code expressly provides for postpetition interest for oversecured creditors in Section 506(b).

The existence of an "equity cushion" is not only the basis for the right to postpetition interest but also the most common source of adequate protection of the secured creditor's interest in property. An oversecured creditor's interest in a debtor's property is measured by the amount of that creditor's claim secured by the

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[2]The relevant pages of this study are reproduced in the appendix at pages 34-39. A copy of the study has been served on respondent and ten copies of the study have been lodged with the Clerk for the convenience of the Court.

debtor's property. If, for example, D owes C $80,000 and that debt is secured by collateral which is worth $100,000, C's interest in the property is $80,000 and there is an equity cushion of $20,000 to serve as "adequate protection" that C's interest in property will not be diminished or destroyed because of the delays of bankruptcy.

If, a month later, $500 of interest has accrued on C's oversecured claim, C's interest in property increases to $80,500 and the adequate protection for that enhanced "interest in property" decreases to $19,500. As an oversecured creditor's "interest in property" increases with the accruing of interest, the "adequate protection" for that "interest in property" decreases. If the court of appeals' decision is permitted to stand, the sad reality will be that, given the length of time until plan confirmation and the low percentage of Chapter 11 cases in which a plan is confirmed, what an oversecured creditor will usually get is no interest payments and an asset returned with a value diminished well in excess of the debtor's depreciation payments. The court of appeals' holding that "an oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only" puts the risk of the duration of the respondent's bankruptcy case on the petitioner. App. 17.

Other secured creditors are also now confronting new, unexpected risks. The court of appeals' decision is not limited to proceedings under Section 362(d) of the Bankruptcy Code, not limited to Chapter 11 bankruptcy cases, and not limited to creditors secured by commercial equipment.

The decision below already has resulted in the change of an adequate protection order under Section 363 of the Bankruptcy Code in a Chapter 7 case involving a creditor secured by accounts receivable. *See In the Matter of M4 Enter., Inc.,* 183 B.R. 981 (Bankr. N.D. Ga. 1995).

Two days before the Eleventh Circuit issued its opinion in this case, a bankruptcy court in Atlanta, Georgia held a final hearing on a Chapter 7 trustee's use of the proceeds from encumbered accounts receivable. Under Section 363 of the Bankruptcy Code, a Chapter 7 trustee (or Chapter 11 trustee or debtor in possession) can use such cash collateral only if there is "adequate protection" of the creditor's interest in the property. Typically, the trustee and the secured creditor reach an agreement as to what shall serve as "adequate protection," and that agreement is approved by the court pursuant to Section 363(c). *See* 3 *Collier Bankruptcy Practice Guide* para. 41.04 (1995). In *M4 Enterprises,* the adequate protection agreement provided for the payment of postpetition interest as it accrued on the creditor's oversecured claim, and this agreement was orally approved by the bankruptcy court at the hearing. 183 B.R. at 981, 984, n.3. The Eleventh Circuit issued its opinion in this case before the bankruptcy court signed the consent order. Looking to the Eleventh Circuit's conclusion that payment of postpetition interest must await the completion of the bankruptcy case, the bankruptcy court concluded that *"Delta Resources* prevents the Court from authorizing an agreement to do so [pay postpetition interest as part of adequate protection]." 183 B.R. at 986.

The decision below may also result in a change of the treatment of home mortgages in an individual debtor's Chapter 11 or Chapter 13 bankruptcy case, by delaying postpetition monthly mortgage payments until the Chapter 11 or Chapter 13 plan is confirmed or the case is otherwise concluded. Consider the effect of the decision below on the following example: D, a Chapter 11 or Chapter 13 individual debtor, owns a home subject to C's mortgage. The home has a value of $90,000; the amount owed on the mortgage is $80,000; and the monthly payment is $700, most of which is interest. Until now, an

individual debtor typically continued making her monthly home mortgage payments after filing a Chapter 11 or Chapter 13 bankruptcy petition.

Under the court of appeals' decision, however, D could stop making monthly home mortgage payments as soon as she filed her bankruptcy petition because, according to the court below, C's interest in the property which must be adequately protected is limited to the decline in the value of the collateral. Moreover, the bankruptcy court that decided the *M4 Enterprises* case would likely hold that D is barred by the Eleventh Circuit's decision in this case from making monthly home mortgage payments until the plan is confirmed or the case otherwise ends. This is true because the Eleventh Circuit reads the Bankruptcy Code as "requir[ing] that the payment of postpetition interest to an oversecured creditor await the completion of the reorganization." App. 16. The application of the court of appeals' decision in this case will affect the availability and cost of home mortgages and other real estate financings as well as the cost and availability of equipment and receivables financing.

II. The Decision Of The Court Of Appeals Is Erroneous.

The court of appeals' holding might have been consistent with the Bankruptcy Act of 1898, which did not expressly provide for either a right to postpetition interest on oversecured claims or a right to adequate protection payments. However, that ruling is inconsistent with the present Bankruptcy Code, which does provide for a right both to postpetition interest and to adequate protection of an interest in property. By recognizing a right to postpetition interest based on an equity cushion and a right to adequate protection of a secured creditor's interest in property, the Bankruptcy Code created complex new questions relating to the secured party's right to the

debtor's equity in collateral, such as whether a debtor can dissipate collateral needed for accrued postpetition interest, and whether a debtor can dissipate collateral needed for anticipated postpetition interest. *See generally* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 181-92 (1986); David Carlson, *Postpetition Interest Under the Bankruptcy Code*, 43 U. of Miami L. Rev. 577, 636-52 (1989).

The court of appeals' consideration of the competing rights and interests of the debtor and an oversecured creditor created by the Bankruptcy Code is incomplete and unworkable. For example, if, as the court of appeals held, adequate protection "encompasses the decline in the value of the collateral only," a debtor could encumber or otherwise use the equity cushion that gives rise to the statutory right to postpetition interest to eliminate that right. Assume again that D owes C $80,000 and that debt is secured by collateral with a value of $100,000. Under Section 506(b) of the Bankruptcy Code, C has a right to postpetition interest based on the equity cushion. Under the decision below, however, D can eliminate any possible recovery of postpetition interest by obtaining a loan secured by the $20,000 cushion since no part of that $20,000 can be paid to C until the completion of the case and D is not required to provide adequate protection of the payment of accrued postpetition interest during the case.

The court of appeals, in denying relief to petitioner, relied heavily on this Court's decision in *Timbers*. The court of appeals stated that "[t]he *ratio decidendi* enunciated by the Supreme Court in *Timbers* that an undersecured creditor is not entitled to postpetition interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1) applies equally well to an oversecured creditor." App. 16 (emphasis in original). That conclusion is mistaken.

In *Timbers,* the Court held that a claim of an undersecured creditor does not include the right to postpetition interest and, therefore, adequate protection of an undersecured creditor cannot include protection of postpetition interest payments. 484 U.S. at 372-73. This Court's holding in *Timbers* that adequate protection cannot include payments for a right that an undersecured creditor *does not* have in no way "applies equally" to the Eleventh Circuit's holding that adequate protection cannot include payments for a right that an oversecured creditor *does* have. Indeed, if the Court's reasoning in *Timbers* was that no creditor, undersecured or oversecured, was entitled to adequate protection payments for postpetition interest, then the Court's lengthy discussion of the Bankruptcy Code's different treatment of oversecured and undersecured creditors was not even dicta, but, instead merely meaningless surplusage. Neither the holding nor the reasoning in *Timbers* supports the Eleventh Circuit's conclusion that payments of interest that has accrued under Section 506(b) of the Bankruptcy Code must await the completion of the case.

Further, in *New York Life Ins. Co. v. Revco D.S., Inc.,* 901 F.3d 1359 (6th Cir. 1990), the Sixth Circuit rejected the argument that *Timbers* prohibits interim adequate protection payments of postpetition interest to an oversecured creditor. The *Revco* case involved a postpetition borrowing under Section 364(d) of the Bankruptcy Code. Section 364(d) empowers a bankruptcy court to approve the debtor's granting its postpetition lender a lien on already encumbered property superior to the existing lien of a pre-petition lender if there is "adequate protection of the interest of the holder of the [pre-petition] lien." 11 U.S.C. § 364(d). In *Revco,* the bankruptcy court's order directed the debtor to make monthly adequate protection payments of accrued postpetition interest to oversecured pre-petition creditors. On appeal, the Sixth

Circuit stated: "NYLIC argues that *Timbers* supports its position that interim payments are illegal under the Bankruptcy Code. In *Timbers*, however, the Supreme Court held that *undersecured* creditors are not entitled to compensation for 'lost opportunity cost' during a Chapter 11 case. Other than the holding that the value of the collateral is the interest that should be adequately protected, *Timbers* does not appear to apply to this case." 901 F.2d at 1365 (emphasis in original).

The Eleventh Circuit's decision is not only inconsistent with the Sixth Circuit's decision in *Revco* but also with the settled practice in the bankruptcy courts. Payment of accrued postpetition interest to oversecured creditors prior to the confirmation of a plan is a common bankruptcy practice. *See, e.g., Revco, supra; M4 Enter., supra; In re Noyes*, 62 B.R. 115, 117 (Bankr. D. Neb. 1985); *In re Mr. D Realty Co.*, 27 B.R. 359 (Bankr. S.D. Ohio 1983). While relatively few reported cases address the payment of accrued postpetition interest to secured creditors as adequate protection, bankruptcy courts address these questions daily and, in unreported orders, regularly grant such adequate protection payments.[3]

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[3]*See* Corinne Ball, *An Overview of Chapter 11*, in *Practising Law Institute, Investing in the Troubled Company*, 556 PLI/Comm 71 (1990) ("over-secured lenders can require the periodic payment of cash equal to the contractual interest accruing on the lender's pre-petition claim as a condition to the extension of post-petition credit. The authorization of such an agreement can be obtained only by receiving authorization from the bankruptcy court for the debtor to use cash collateral and upon a bankruptcy court order granting the over-secured lender such payments as adequate protection for its collateral. *See* 11 U.S.C. §§ 361 and 363. This type of post-petition financing agreement was authorized by the court in *In re Federated Dept. Stores, Inc.*, pursuant to an unpublished order"); *Cf.* 3 *Collier on Bankruptcy* para. 506.5, at 506-44 (15th ed. 1995) (adequate protection can be the basis for payments of postpetition interest).

In sum, the conclusions and holdings of the court of appeals are not workable and are not consistent with this Court's ruling and reasoning in *Timbers*, with Bankruptcy Code provisions and policies, or with bankruptcy court decisions and practices. Unless the Court addresses these issues now, the decision below will result in costly and needless litigation and unwarranted changes in the administration of business and consumer bankruptcy cases. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 12, 1995

In re DELTA RESOURCES, INC., Debtor.

ORIX CREDIT ALLIANCE, INC., Appellee,

v.

DELTA RESOURCES, INC., Appellant.

No. 93-6919

United States Court of Appeals, Eleventh Circuit.

June 14, 1995.

In Chapter 11 proceedings, oversecured creditor moved for relief from automatic stay. The Bankruptcy Court denied the motion and determined that oversecured creditor's interest in its collateral would be adequately protected by periodic cash payments, including accruing postpetition interest. Oversecured creditor appealed. Following further motions, the United States District Court for the Northern District of Alabama, Nos. CV 93-G-1002-W, CV 93-G-1019-W, J. Foy Guin, Jr., J., reversed, and debtor appealed. The Court of Appeals held that: (1) it had jurisdiction over appeals; (2) oversecured creditor's interest in property which must be adequately protected encompasses decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt; and (3) oversecured creditor was not entitled to periodic payments of accruing postpetition interest during pendency of automatic stay.

District court judgment reversed and remanded.

Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON and CARNES, Circuit Judges, and MOYE,* Senior District Judge.

PER CURIAM:

Delta Resources, Inc., ("Delta") appeals the district court's order requiring payment of postpetition interest as part of the adequate protection it was required to pay as debtor-in-possession to appellee, Orix Credit Alliance Inc. ("Orix"). We reverse.

I. FACTS AND PROCEDURAL BACKGROUND

On November 30, 1992, appellant Delta filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq., in the United States Bankruptcy Court for the Northern District of Alabama. On December 29, 1992, appellee Orix, claiming to be an oversecured creditor, moved for relief from the automatic stay, pursuant to 11 U.S.C. § 362, on the ground that, *inter alia*, its perfected security interest in the purchase money equipment was not adequately protected.

At the final hearing before the bankruptcy court the parties agreed that the then-value of the collateral, approximately 13 pieces of heavy equipment, was $643,500. The bankruptcy court concluded that the collateral was slightly depreciating but did not find whether Orix in fact was an oversecured creditor.[1] Instead, the court

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*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

[1]An oversecured creditor is a secured creditor whose collateral is worth more than the amount of the debt to it. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1387 (5th Cir. 1986), *on reh'g*, 808 F.2d 363 (1987) (en banc court reinstates panel opinion), *aff'd*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

merely assumed, as Orix had asserted, that Orix was an oversecured creditor.

The bankruptcy court determined that the equipment at issue was necessary to the effective reorganization of the debtor and thus, under 11 U.S.C. § 362(d)(2), Orix could not receive relief from the automatic stay.[2] However, the bankruptcy court did not determine whether the creditor was entitled to postpetition interest reasoning that that issue should be dealt with at the time of confirmation of the debtor's Chapter 11 plan.

The bankruptcy court also determined that Orix's secured interest in its collateral would be adequately protected by periodic cash payments in accordance with 11 U.S.C. § 361(1).[3] The bankruptcy court granted Orix ad-

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[2]"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

> (1) for cause, including the lack of adequate protection of *an interest in property* of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> > (A) the debtor does not have an equity in such property; *and*
> >
> > (B) such property is not necessary to an effective reorganization."

11 U.S.C. §§ 362(d)(1) and (2) (A) and (B) (emphasis added).

[3]"When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a *decrease in the value of* such entity's *interest in such property.*"

11 U.S.C. § 361(1) (emphasis added).

equate protection in the amount of $9,972.41 per month to cover accruing depreciation of the equipment, but rejected Orix's contention that as an oversecured creditor it was entitled to receive postpetition interest as part of adequate protection. Accordingly, the bankruptcy court denied Orix's motion for relief from stay.

On April 26, 1993, Orix filed a notice of appeal to the district court from the bankruptcy court's order denying relief from the automatic stay. Orix also filed a motion for leave to appeal.

After Delta failed to pay the first required adequate protection payment, Orix filed a motion to compel payment which the bankruptcy court denied on April 19, 1993. Orix then filed a notice of appeal to the district court from the bankruptcy court's denial of its motion to compel payment. Once again, Orix filed a motion for leave to appeal. Thereafter, Delta filed a motion to stay the briefing schedule and objected to the appeals as premature and thus not properly before the district court.

By order of June 22, 1993, the district court consolidated those appeals. The district court determined that the appeals from the bankruptcy court's orders were as of right. Alternatively, however, the court stated that it would exercise its discretion to hear the appeals and granted the motions for leave to appeal.

On October 19, 1993, the district court entered a "final order" reversing the bankruptcy court. Extending the holding of *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988), the district court determined that an oversecured creditor is entitled to postpetition interest as part of adequate protection. The district court found that Delta should retroactively pay to Orix monthly adequate protection payments consisting of $9,972.41 for the monthly depreciation of its collateral, as well as an additional

amount of $8,292.90 in postpetition interest to maintain its equity cushion. The district court remanded the case to the bankruptcy court directing that Delta pay that amount to Orix retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench denying relief from stay but ordering adequate protection. Delta filed a notice of appeal challenging the district court's reversal of the bankruptcy court's orders. There is no certification under 28 U.S.C. § 1292(b).

Thereafter, the equipment, which was the subject of the motion for relief from stay, was sold and Orix was paid the proceeds of the sale. On January 3, 1994, with the approval of the bankruptcy court, the parties entered into a consent order on remand concerning the district court's order for adequate protection. The equipment at issue having "been sold and the proceeds of the equipment and the interplead adequate protection payments covering depreciation only," Supp.Rec. doc. 19, having been paid to Orix, the issue on appeal was limited to whether the postpetition interest payments ordered by the district court "are due to be paid now because it [Orix] is an unsecured creditor." *Id.* The parties also agreed that Orix would temporarily postpone its collection efforts for the adequate protection payments for postpetition interest and that, at that time, the bankruptcy court need not enforce the mandate of the district court.

On February 18, 1994, the district court granted in part and denied in part Delta's motion to supplement the record. The district court granted Delta's motion to include: 1) the January 3, 1994, consent order on remand entered by Bankruptcy Judge George S. Wright; 2) Orix's November 18, 1993, opposition to motion to stay pending appeal; and 3) Orix's November 2, 1993, motion to enforce appellate order. The district court denied Delta's motion to supplement the record as to: 1) the

December 21, 1993, order and memorandum of decision by Bankruptcy Judge Wright applying the "transformation rule" to the competing interests of AmSouth Bank, N.A. and Orix, and 2) Orix's January 3, 1994, motion to reconsider transformation rule decision because these documents post-dated the district court's order on appeal and had not been before the district court during the course of the appeal.

Nonetheless, this Court may take judicial "notice of another court's order . . . for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation and related filings." *United States v. Jones*, 29 F.3d 1549, 1553-54 (11th Cir. 1994). Here, the bankruptcy court entered an order on December 21, 1993, in the adversary proceeding between creditors AmSouth Bank, N.A. and Orix deciding which creditor had the first priority liens on the heavy equipment at issue, and about which Orix claims to be oversecured. *See AmSouth Bank, N.A. v. Orix Credit Alliance, Inc. (In re Delta Resources)*, 162 B.R. 562 (Bankr. N.D.Ala. 1993).

Although we may not take judicial notice of a finding of fact by the bankruptcy court, *United States v. Jones*, 29 F.3d at 1553, we may note that that the bankruptcy court determined as matter of law that the "transformation rule" is yet the law of the Eleventh Circuit and that under the undisputed facts of this case "AmSouth's security interest in all the debtor's accounts receivables and its equipment is superior to that of ORIX Credit Alliance—including the equipment ORIX originally financed for the debtor, and which was the subject of previous contested matters in this court." *In re Delta Resources*, 162 B.R. at 572. Whether the bankruptcy judge's ruling on the motions for summary judgement in this adversary proceeding may yet reach this Court is uncertain.

II. ANALYSIS

A. Appellate Jurisdiction in Bankruptcy

The first issue presented for decision is whether we may take jurisdiction of this appeal. In the case *sub judice,* the district court accepted Orix's appeal of right as well as in its discretion granting Orix leave to appeal the bankruptcy court's order denying Orix's motion for relief from the automatic stay and awarding Orix only a portion of the adequate protection it sought. At that time, the bankruptcy court had made no finding whether the creditor was entitled to postpetition interest, ostensibly because the issue of postpetition interest might be dealt with in confirmation of the debtor's Chapter 11 plan. And, since the adversary proceeding between AmSouth Bank, N.A. and Orix was pending, it was not then possible to determine precisely what collateral Orix held and, thus, a formal valuation of Orix's secured interest was not possible.

Whether the bankruptcy court's order was a final order, *vel non,* we need say no more than the district court properly exercised jurisdiction. For, even assuming that the bankruptcy court order was not a final order, the district court did not abuse its discretion in exercising interlocutory jurisdiction over the bankruptcy court order.

Had we concluded that the bankruptcy court order at issue was an interlocutory order, the critical question nevertheless would be whether the district court issued a final order which could be appealed to the court of appeals under 28 U.S.C. § 158(d). To begin, in order for a court of appeals to have jurisdiction over a bankruptcy appeal from the district court, the order being appealed from the district court must have been a final order itself, or alternatively, some exception to the finality rule must be applicable. *Martin Bros. Toolmakers, Inc. v. Industrial*

Dev. Bd. (In re Martin Bros. Toolmakers, Inc.), 796 F.2d 1435, 1437 (11th Cir. 1986). *See Growth Realty Cos. v. Regency Woods Apartments (In re Regency Woods Apartments, Ltd.)*, 686 F.2d 899 (11th Cir. 1982). *Cf.* 1 *Collier on Bankruptcy*, ¶ 3.03 at 3-194 (Lawrence P. King ed., 15th ed. 1994) ("[i]f the district court has granted leave to appeal an interlocutory order, its decision cannot be final for section 158(d) purposes, and no appeal to the court of appeals will lie").

Here, the district court's order did not disturb the bankruptcy court's decision not to lift the automatic stay. Instead, relying on *Timbers*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740, the district court held that as a matter of law an oversecured creditor is entitled to postpetition interest as part of adequate protection. The district court then determined the amount of adequate protection which Delta was required to pay as postpetition interest.

In this Circuit, *"district court orders affirming or reversing the bankruptcy judge's* grant or denial of relief from an automatic stay consistently have been held by the courts to be *a final decision* reviewable on appeal." *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting, Inc.)*, 871 F.2d 1023, 1026 (11th Cir.) (citations omitted) (emphasis added), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989). Furthermore, a district court ruling which includes a remand may be a 'final decision' if all that remains to be done is the performance of a ministerial duty. *Gulf Refining Co. v. United States*, 269 U.S. 125, 136, 46 S.Ct. 52, 53, 70 L.Ed. 195 (1925) (rendering judgment for the exact sums set forth in stipulations was a ministerial duty) . . . *Miscott Corp. v. Zaremba Walden Co. (In re Miscott)*, 848 F.2d 1190, 1192 (11th Cir. 1988) (other citations omitted). In this case, the district court reversed the decision of the bankruptcy court and determined that Orix was entitled to adequate protection payments which should include

monthly postpetition interest, in addition to the monthly depreciation previously determined by the bankruptcy court. The district court also determined the amount of postpetition interest, thus, increasing the amount of adequate protection payments Delta must make to Orix.

The district court did not require the bankruptcy court to determine anything, factual or legal, in its remand. The bankruptcy court need not have determined the amount of adequate protection payments or exercise any discretion in complying with the district court's order. And although the district court did not pass title to any property, the district court did direct the delivery of property, here, money. Further, although the district court did not reverse the bankruptcy court's decision to *maintain* the automatic stay, it directed the bankruptcy court to make direct payments of sums certain by Delta to Orix. Such a remand does not require "significant judicial activity," *In re Regency Woods Apartments, Ltd.*, 686 F.2d at 901, which could change the character of this otherwise final order of the district court to an interlocutory order. Thus, we take jurisdiction over this two-level bankruptcy appeal under 28 U.S.C. § 158(d) on a very narrow legal question.[4]

B. Standard of Review

> "As the second court of review of a bankruptcy court's judgment, this court examines independently the bankruptcy court's factual and legal determinations . . . ." *In re Club Assoc.*, 951 F.2d 1223, 1228 (11th Cir. 1992) (footnote and internal quote marks omitted). "Factual find-

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[4]Since there was no § 1292(b) certification we cannot apply the Supreme Court's ruling in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992).

> ings by the bankruptcy court are reviewed under the limited and deferential clearly erroneous standard." *Id.* "In contrast, legal conclusions by the bankruptcy court and the district court are reviewed by this court *de novo*." *Id.*

Allen v. Green (In re Green), 31 F.3d 1098,1099 (11th Cir. 1994).

C. Adequate Protection

The question before us is not whether an oversecured creditor whose collateral is worth more than the amount of its debt in a Chapter 11 bankruptcy case may obtain postpetition interest as part of its claim. Indeed, it seems beyond peradventure that a creditor's right to recover postpetition interest on its oversecured claim pursuant to 11 U.S.C. § 506(b)[5] is virtually "unqualified." *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 298 (1989). *Equitable Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381 (11th Cir. 1990). *Cf. Rake v. Wade*, — U.S. —, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) (oversecured claimant entitled to preconfirmation and postconfirmation interest on arrearages in Chapter 13 cases). Rather, the narrow legal issue presented for decision is whether Orix, purportedly

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[5] "To the extent that an allowed secured claim is *secured by property the value of which, after any recovery* under subsection (c) of this section, *is greater than the amount of such claim*, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

11 U.S.C. §§ 506(b) (emphasis added) and (c).

an oversecured creditor, was entitled to receive periodic cash payments for accruing postpetition interest as part of adequate protection, pursuant to 11 U.S.C. § 362(d)(1), in order to preserve the value of its equity cushion. Appellant Delta does not dispute that an oversecured creditor is entitled to postpetition interest on its claim, although, Delta does dispute whether Orix was, in fact, an oversecured creditor.

Here, the bankruptcy court did not make a factual finding as to Orix's status, but simply *assumed* that Orix was an oversecured creditor for purposes of determining the amount of adequate protection necessary to protect the creditor's interest.[6] The district court, relying upon the Supreme Court's opinion in *Timbers,* reversed the bankruptcy court reasoning that

> [a]s an oversecured creditor, Credit Alliance is entitled to postpetition interest under 11 U.S.C. § 506(b). This section states that "to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose." As this interest accrues, it also becomes secured by the security interest held by the creditor in the property. Thus, the security cushion represented by the value of the property above the creditor's security interest in the property is depleted daily as the interest accrues. As used in the applicable bankruptcy provisions, the value of the credit-

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[6]These similar rulings of the bankruptcy and district courts apparently have had the effect of maintaining the funds involved in a sort of suspended, quasi-escrow manner.

> or's interest means the value of the collateral. *The security or collateral cushion is an inherent part of the value of the collateral. Accordingly, the oversecured creditor has a valid property interest in this security cushion and has a right to adequate protection of this interest. United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

(Emphasis added). And, not surprisingly, on appeal both parties rely on the Supreme Court's opinion in *Timbers* as support for their position.

The Supreme Court has determined that "[t]he phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.' . . . . We think the phrase 'value of such entity's interest' in § 361(1) and (2), when applied to secured creditors, means the same." *Timbers*, 484 U.S. at 372, 108 S.Ct. at 631, 98 L.Ed.2d at 749. The enquiry before us turns on whether the "interest in property" to be protected by 11 U.S.C. § 362(d)(1) entitles an oversecured creditor to receive periodic postpetition interest payments to ensure against the diminution in value of its equity cushion as a part of adequate protection or whether it is designed only to protect against diminution in the value of the collateral, i.e.—depreciation.

Appellee Orix asserts that as interest accrues on its claim the interest by the terms of its contract also becomes secured by its security interest in Delta's assets. Therefore, Orix contends, an oversecured creditor's position erodes by the accrual of postpetition interest and ultimately the adequate protection becomes inadequate. That is, unless the interest is paid, Orix's debt becomes less and less oversecured and eventually becomes undersecured. While Orix is correct that the size of the equity cushion decreases as postpetition interest accrues, the increase in the size of its secured claim resulting from the accrual of that interest is entitled to adequate

protection only to the extent that the value of the collateral at the time of filing exceeded the value of Orix's original secured claim.

To begin, "[u]pon the filing of a bankruptcy petition, § 362 of the Code imposes an automatic stay on actions by creditors to collect their claims from a debtor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1387 (5th Cir. 1986), *on reh'g*, 808 F.2d 363 (1987) (en banc court reinstates panel opinion), *aff'd*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). Yet a creditor is not without recourse to protect its interests. "Under § 362(d), a creditor may obtain relief from the [automatic] stay (1) 'for cause, including the lack of adequate protection' of the creditor's interest in the collateral." *Timbers*, 793 F.2d at 1387-88.[7]

Ordinarily, creditors are not allowed a claim for interest accruing on their debts during bankruptcy proceedings. *Timbers*, 793 F.2d at 1385. Yet, *as an exception* to that rule, an oversecured creditor, but not an undersecured creditor having the same risk (indeed, it is possible for the undersecured creditor's risks to be much larger quantitatively), is entitled to receive postpetition interest as part of its claim at the time of confirmation of a plan or reorganization, that is, at or near the conclusion of the bankruptcy case. 11 U.S.C. § 506(b). Judge Randall of the Fifth Circuit explained the rationale for this exception.

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[7]The Code provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—(1) for cause, including the lack of adequate protection of an *interest in property* of such party in interest." 11 U.S.C. § 362(d)(1) (emphasis added).

> [T]he interest provisions of the Code and its predecessors, as interpreted by the Supreme Court for almost a century, are premised on the equitable principle that the unencumbered assets of a debtor's estate will not be used to benefit one class of creditors at the expense of another . . . . [Thus,] [a]llowing a claim for postpetition interest by an oversecured creditor, . . . is not inconsistent with that equitable principle, *because only assets encumbered by the creditor's lien will be used to fund the payment of postpetition accrued interest.*

Timbers, 793 F.2d at 1387 (emphasis added).

Nevertheless, the Supreme Court has indicated that an oversecured creditor's allowed secured claim for postpetition interest, which is determined near the conclusion of the bankruptcy case, must be denied to the extent that, together with the principal amount of the claim, it exceeds the value of the collateral. Or put another way, the oversecured creditor's allowed secured claim for postpetition interest is limited to the amount that a creditor was oversecured at the time of filing.

> Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims—just as it denies *over*secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that "*[t]o the extent that* an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim." (Emphasis added.) Since this provision permits postpetition interest to be paid only out of the "security cushion,"

> the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest. See 11 U.S.C. § 502(b)(2). If the Code had meant to give the undersecured creditor, who is thus denied interest on his *claim*, interest on the value of his *collateral*, surely this is where that disposition would have been set forth, and not obscured within the "adequate protection" provision of § 362(d)(1). Instead of the intricate phraseology set forth above, § 506(b) would simply have said that the secured creditor is entitled to interest "on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser."

Timbers, 484 U.S. at 372-73, 108 S.Ct. at 631, 98 L.Ed.2d at 749.

The Supreme Court has recognized that an undersecured creditor may be entitled to adequate protection to ensure against the decline in the value of its collateral. However, an undersecured creditor is not entitled to receive postpetition "interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1)." *Timbers*, 484 U.S. at 382, 108 S.Ct. at 636, 98 L.Ed.2d at 755 (emphasis added).

Ordinarily, the matter of adequate protection is determined at or near the inception of a bankruptcy case. By contrast, the determination of a creditor's secured status, pursuant to 11 U.S.C. § 506, comes at or near the conclusion of a bankruptcy case.

> Under [11 U.S.C.] § 506(c), the debtor may recover from property securing a creditor's allowed secured *claim* the reasonable and necessary costs and expenses of preserving or disposing of the property, to the extent of any benefit to the creditor. If, after reducing the amount of

> the allowed secured claim by the amount of that recovery, the creditor is oversecured, it is entitled to interest at the contract rate on its net allowed secured claim. § 506(b). *The timing of the payment of accrued interest to an oversecured creditor (at the conclusion of the proceeding) is doubtless based on the fact that it is not possible to compute the amount of the § 506(c) recovery (and, accordingly, the amount of the net allowed secured claim on which interest is computed) until the termination of the proceeding.*

Timbers, 793 F.2d at 1407 (emphasis added).

Similarly, we conclude that 11 U.S.C. § 506(b), providing for postpetition interest on oversecured claims, read *in pari materia* with 11 U.S.C. § 362(d)(1), concerning conditioning the automatic stay on adequate protection, and 11 U.S.C. § 502, regarding the allowance of claims, requires that the payment of accrued postpetition interest to an oversecured creditor await the completion of reorganization or confirmation of the bankruptcy case. The *ratio decidendi* enunciated by the Supreme Court in *Timbers* that an undersecured creditor is not entitled to receive postpetition interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1) applies equally well to an oversecured creditor. Such an interpretation of the Bankruptcy Code is consistent whether the secured creditor is undersecured or oversecured, otherwise "§ 506(b) would simply have said that the *secured* creditor [whether oversecured or undersecured] is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser.' " *Timbers*, 484 U.S. at 372-73, 108 S.Ct. at 631, 98 L.Ed.2d at 749 (emphasis added). Accordingly, viewing the allowance of postpetition interest to oversecured creditors as a limited ex-

ception only,[8] we hold that an oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt. The bankruptcy court accomplished that by allowing adequate protection in the amount of accruing depreciation. *See In re Westchase I Assoc.*, 126 B.R. 692 (W.D.N.C. 1991); David G. Epstein et al., *Bankruptcy* § 3-27, at 142-43 (1993).

We think this rule results in the appropriate balance between the conflicting interests of the oversecured creditor on the one hand and the estate, as well as other creditors, secured and unsecured, on the other hand. As one commentator points out:

> [t]here is certainly no reason intrinsic to the phenomenon of credit that entitles oversecured creditors to interest out of their collateral before junior creditors, whether secured [perhaps by the identical collateral] or unsecured, receive any of their principal.

Niall L. O'Toole, *Adequate Protection and Postpetition Interest in Chapter 11 Proceedings*, 56 Am.Bank.L.J. 251, 253 (1982).

Here, even accepting the bankruptcy court's assumption that Orix was an oversecured creditor, although it never made such a factual finding, for the reasons stated above, Orix, as a matter of law, was not entitled to receive periodic payments for accruing postpetition interest as part of adequate protection for any period of time.[9]

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[8] *See*, Niall L. O'Toole, *Adequate Protection and Postpetition Interest in Chapter 11 Proceedings*, 56 Am.Bank.L.J. 251 (1982).

[9] We express no opinion whether Orix may yet be entitled to postpetition interest on its claim, irrespective of the bankruptcy court's subsequent decision that Orix was not an oversecured creditor. *See supra* at 7.

III. CONCLUSION

The district court's order awarding Orix monthly postpetition interest in the amount of $8,292.90 is REVERSED and this case REMANDED to the district court for further proceedings not inconsistent herewith.

FILED
June 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-6919

District Court Nos. CV 93-G-1002 & CV93-G-1019
Bankruptcy Court No. 92-72874

IN RE: DELTA RESOURCES, INC.,

Debtor.

ORIX CREDIT ALLIANCE, INC.,

Appellee,

versus

DELTA RESOURCES, INC.,

Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before EDMONDSON and CARNES, Circuit Judges, and MOYE,* Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 14, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: July 18, 1995

FILED
Oct. 19, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: Delta Resources, Inc.,	) Bankruptcy No.
	) BK92-72874
Debtor.	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1002-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	)
	) CONSOLIDATED
	) WITH
	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1019-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	) Entered Oct. 19, 1993

MEMORANDUM OPINION

This cause is before the court on appeal by Orix Credit Alliance, Inc. (Credit Alliance) from a decision by the United States Bankruptcy Court for the Northern District of Alabama. The sole issue for this court's decision is whether the bankruptcy court erred in its ruling that Delta Resources (Delta), the debtor, has provided adequate protection to its creditor Orix. Such conclusions of law reached by the bankruptcy court are reviewed *de novo* by this court. *Olympia & York Florida Equity v. Bank of New York,* 913 F.2d 873, 879 (11th Cir. 1990). A finding of adequate protection will not be set aside unless that finding was clearly erroneous. *Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.),* 727 F.2d 1017, 1019 (11th Cir. 1984). Having reviewed the record, the applicable law, and the submissions of counsel, the court finds that the decision of the bankruptcy court is due to be reversed as clearly erroneous.

The facts of this case are essentially undisputed and were stipulated to in conjunction with the bankruptcy proceedings. Delta filed a petition for bankruptcy under 11 U.S.C. §101, *et seq.* Credit Alliance holds a perfected security interest in Delta's accounts receivable, equipment, general intangibles, and other property. Credit Alliance's primary collateral consists of eleven pieces of heavy equipment (equipment). Credit Alliance filed a motion for relief from stay contending among other things that its security interest in the equipment was not adequately protected. Delta opposed the motion contending that Credit Alliance's interest was adequately protected and that the equipment was necessary to Delta's reorganization. An evidentiary hearing was held at which AmSouth, a competing creditor, appeared. As of the petition date, Delta owed Credit Alliance $826,339.36. The parties stipulated that the value of the

equipment was $643,500.00. Credit Alliance's other collateral consists of a first lien on Delta's tax refund of approximately $140,000.00 and a second lien on Delta's accounts receivable which second lien has a value in excess of $100,000.00. Thus, the total value of Credit Alliance's collateral is at least $883,500.00. The creditor admitted at the hearing that the value of the collateral exceeded the debt. Thus, it is classified as an oversecured creditor. Bankruptcy opinion of April 14, 1993, paragraph 4. In the course of the bankruptcy proceedings, Delta agreed that the equipment is depreciating at a rate of approximately $9,000.00 per month. The bankruptcy court found that the sum of $9,972.41 would serve as adequate protection of Credit Alliance's security interest. Bankruptcy opinion of April 14, 1993, paragraph 12. Although Credit Alliance contends that the monthly depreciation is greater than this amount, it has accepted this figure as representing the amount of monthly depreciation for purposes of this appeal. The bankruptcy court expressly reserved the issue of whether Credit Alliance was entitled to post-petition interest. Bankruptcy opinion of April 14, 1993, paragraph 12.

Delta failed to make its first payment at the time due. At about the same time, AmSouth filed a complaint alleging that it had a superior interest in the equipment. AmSouth alleged that Credit Alliance was not entitled to the proceeds of any sale of the equipment nor to the adequate protection payments ordered by the bankruptcy court. AmSouth further contended that it was due to be paid the adequate protection payments ordered by the bankruptcy court. Delta filed a complaint in intervention proposing to pay the funds into the court rather than to Credit Alliance. The bankruptcy court ordered that the funds be paid into escrow pending further orders and denied Credit Alliance's motion to compel. An appeal from the order denying relief from stay and an

appeal from the order denying the motion to compel were filed. Dispute as to whether these orders were appealable was resolved by this court's finding that the appeals were properly before it.

As an oversecured creditor, Credit Alliance is entitled to post-petition interest under 11 U.S.C. §506(b). This section states that "to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which the claim arose." As this interest accrues, it also becomes secured by the security interest held by the creditor in the property. Thus, the security cushion represented by value of the property above the creditor's security interest in the property is depleted daily as the interest accrues. As used in the applicable bankruptcy provisions, the value of the creditor's interest means the value of the collateral. The security or collateral cushion is an inherent part of the value of the collateral. Accordingly, the oversecured creditor has a valid property interest in this security cushion and has a right to adequate protection of this interest. *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

In the case at bar, the equity cushion is small, only $57,160.64 or 6.47% of the total value of the collateral exclusive of post-petition interest. Undisputedly, the value of the collateral is not appreciating. The payments ordered by the bankruptcy court would offset future depreciation in the value of the collateral but would not protect Credit Alliance from the damage to the security cushion engendered by the accruing interest. The debtor had the burden of proving that the creditor's collateral

cushion was being maintained at or near its prebankruptcy level. 11 U.S.C. §362(g). It failed to do so.

The risk to its security cushion faced by Credit Alliance is further increased by the claims of AmSouth. AmSouth has a first lien and security interest in the debtor's accounts receivable. AmSouth is an oversecured creditor as to these accounts and as such is entitled to post-petition interest under 11 U.S.C. §506(b). Credit Alliance is therefore a junior lienholder as to these accounts receivable. As such, it is entitled to adequate protection payments to protect it from the eroding effect the interest payments to AmSouth will cause to Credit Alliance's security cushion. *Ridgemont Apartment Associates, Ltd. v. Atlanta English Village, Ltd.*, 110 Bankr. 77 (N.D. Ga)., *aff'd* 890 F.2d 1166 (11th Cir. 1989). This right to adequate protection, even as a junior lienholder, would also exist as to Credit Alliance's interest in the equipment should AmSouth be shown to have senior interest in it as well. The court finds that Delta failed to carry its burden of proof regarding adequate protection of Credit Alliance's interest in the property. 11 U.S.C. §362(g).

Accordingly, the court holds that the decision of the bankruptcy court is due to be reversed. The court further finds that the case is due to be remanded to the United States Bankruptcy Court for the Northern District of Alabama, Western Division, with instructions that it order monthly adequate protection payments of $18,264.31 (bankruptcy court determined monthly depreciation of $9,972.41 plus $8,292.90 monthly postpetition interest) be paid by Delta Resources, Inc. directly to Credit Alliance retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench denying relief from stay. An order in conformity with this opinion shall be entered contemporaneously herewith.

DONE this 19th day of October 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

FILED
Oct. 19, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: Delta Resources, Inc.,	) Bankruptcy No.
	) BK92-72874
Debtor.	)
	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1002-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	)
	) CONSOLIDATED
	) WITH
	)
ORIX CREDIT ALLIANCE, INC.,	)
	)
	)
Appellant,	)
	)
v.	) CIVIL ACTION NO.
	) 93-G-1019-W
	)
DELTA RESOURCES, INC.,	)
	)
Appellee.	) Entered Oct. 19, 1993

FINAL ORDER

This cause is before the court on appeal by Orix Credit Alliance from a decision by the United States Bankruptcy Court for the Northern District of Alabama, Western Division. Having reviewed the record, the submission of counsel, and the applicable law, the court finds that the decision of the bankruptcy court is due to be reversed and the case remanded to that court with instructions. In accordance with the memorandum opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the decision of the bankruptcy court is hereby REVERSED and the case REMANDED to the United States Bankruptcy Court for the Northern District of Alabama, Western Division, with instructions that it order monthly adequate protection payments of $18,264.31 (bankruptcy court determined monthly depreciation of $9,972.41 plus $8,292.90 monthly post-petition interest) be paid by Delta Resources, Inc. directly to Credit Alliance retroactive to March 17, 1993, the date of the bankruptcy court's order from the bench denying relief from stay.

DONE and ORDERED this 19th day of October 1993.

/s/ J. Foy Guin, Jr.
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

FILED
April 14, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

IN RE: BK92-72874

DELTA RESOURCES, INC.,

CHAPTER 11

DEBTOR

ORDER DENYING RELIEF FROM STAY AND
GRANTING ADEQUATE PROTECTION PAYMENTS

This matter came before the court on a motion for relief from stay filed by ORIX Credit Alliance to enforce its security interest against equipment used by the debtor, Delta Resources, Inc. After two lengthy hearings, testimony of witnesses and numerous pleadings, the court has deduced that indeed this dispute is simply matter of providing adequate protection for this oversecured creditor's interest until the debtor's Chapter 11 plan can provide a more permanent remedy. Therefore, the court hereby

ORDERED, DECREED AND ADJUDGED:

1. That in Credit Alliance's motion for relief from stay (Doc. 48) it sought the court's permission to enforce its security interest against thirteen pieces of John Deere heavy equipment used in Delta Resources, Inc.'s business;

2. That the creditor alleged its interest was not adequately protected and further, that the debtor lacked equity in the collateral and that the collateral was not necessary to its financial reorganization;

3. And Credit Alliance's motion also said that the notes in the case claim

> a security interest in the property and in any and all inventory, goods, equipment, machinery, general intangibles, contract rights, furniture, fixtures and assets of any and every kind, wherever located, not or hereafter belonging to [Debtor] or in which [Debtor] has any interest[.]

(Doc. 29).

4. Consequently, Credit Alliance admitted in its opening statement that it was oversecured.

5. 11 U.S.C. § 362(d) provides two grounds upon which a secured creditor like Credit Alliance may receive relief from the automatic stay. Section 362(d)(1) provides that a creditor may receive relief "for cause, including the lack of adequate protection" while Section 362(d)(2) provides relief from stay for the creditor who can show "(A) the debtor does not have an equity in such property; *and* (B) such property is not necessary to an effective reorganization." (emphasis added)

6. The court determines that the equipment which is at issue in this dispute is necessary for the reorganization of the debtor. Therefore Credit Alliance may not receive relief from stay under Section 362(d)(2). The portion of the creditor's motion seeking relief from stay under this code subsection is DENIED.

7. However, the creditor is due adequate protection of the value of its security interest in the equipment. The parties agreed at hearing, based on the testimony of Jim Skelton, that the collateral is worth approximately $643,500. Skelton estimated the useful life of the equipment at five years. However, this estimate was based on information that the equipment would soon be used

more aggressively. information that was not verified by the debtor.

8. Additionally, other witnesses Bobby Suggs and David Patterson, testified that Delta Resources maintained its equipment extremely well, better than industry average. Consequently, the court determines that the useful life of the John Deere equipment at issue here is eight years.

9. The first credit purchases of equipment was September 30, 1991 with the total purchase valued at approximately $1 million, and that total had depreciated to $643,500.00 15 months later.

10. At the end of eight years (subtracting 15 months) the testimony of David Patterson indicated that the equipment would be worth 30 percent of the purchase price.

11. Therefore, the court is going to determine that Delta Resources' proposal to pay Credit Alliance $9,972.41 per month would be in keeping with straight-line depreciation on equipment of this value which is exceptionally well-maintained.

12. Such a $9,972.41-a-month payment will serve as adequate protection of this creditor's security interest. Inasmuch as the collateral in the instant case is slightly declining in value (as distinguished from *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988) which was slightly appreciating in value), then such creditor is entitled to adequate protection by means of periodic payments under § 361(1) to "the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property" — here ORIX Credit Alliance is due to be paid $9,972.41 a month periodic payments as adequate protection. The court will make no finding at this time as to whether the creditor is entitled to post-petition interest, an issue which may be dealt with in confirmation of the

debtor's Chapter 11 plan. *Cf. United Savings Association v. Timber of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988).

13. Therefore, Credit Alliance's motion for relief from stay under 11 U.S.C. § 362(d)(1) must also be DENIED since its secured interest in its collateral will be adequately protected by periodic cash payments, a means for adequate protection listed in 11 U.S.C. § 361(1).

14. This order was originally made from the bench March 17, and the court directed Delta Resources to begin the $9,972.41-per-month payments April 1, 1993.

DONE AND ORDERED this 14th day of April, 1993.

/s/ George S. Wright
GEORGE S. WRIGHT
BANKRUPTCY JUDGE

cc: Debtor - Delta Resources, Inc.
Attorney - Jerry W. Schoel, Esq.
Trustee - Helen H. Ellis, Estate Analyst
Parties In Interest -
ORIX Credit Alliance,
Attorneys, Michael L. Hall and William S. Hereford

FILED
April 23, 1993

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

IN RE:
DELTA RESOURCES, INC.

CHAPTER 11
Debtor. CASE NO. 92-72874

ORDER

The above-styled MOTION TO COMPEL PAYMENT FILED BY ORIX CREDIT ALLIANCE, INC. having been set down for a hearing before this Court on April 13, 1993, upon Notice of Hearing to the parties in interest,

IT IS HEREBY ORDERED that the MOTION TO COMPEL PAYMENT FILED BY ORIX CREDIT ALLIANCE, INC. be, and the same is, hereby DENIED.

DONE AND ORDERED this 19th day of April, 1993.

/s/ George S. Wright
GEORGE S. WRIGHT
BANKRUPTCY JUDGE

rs

cc: Debtor(s) - DELTA RESOURCES, INC.
Attorney - JERRY W. SCHOEL
Trustee - DIP
Estate Analyst - HELEN ELLIS
Parties In Interest - ORIX Credit Alliance, Inc.
C/O MICHAEL L. HALL AND
WILLIAM S. HEREFORD, ATTORNEYS
AMSOUTH BANK, N.A.
C/O DAVID B. ANDERSON

STATISTICAL ANALYSIS OF CHAPTER 11

BY: ED FLYNN
MANAGEMENT ANALYST
BANKRUPTCY DIVISION

October 1989

IV. CONFIRMATION RATES

Prior to the Ernst & Young study, the only information available on confirmation rates was obtained from those cases which have been closed. As noted above, only about one out of fifteen closed chapter 11 cases had been confirmed. The results of the Ernst & Young study indicate that the overall confirmation rate for chapter 11 cases filed prior to 1987 was about 17%, and that this rate had been rising steadily. I estimate that 25-30% of the chapter 11 cases filed in or after 1987 will be confirmed.

A. CONFIRMATION RATES FOR CASES FILED PRIOR TO 1987:

To date, only about 4.3 percent of all chapter 11 cases filed prior to 1987 have been closed after confirmation. Ernst & Young found that an additional 10.5% of these cases have been confirmed, but not closed. It is further estimated that an additional two to three percent of pre-1987 cases will eventually get confirmed. Adding these three figures together gives a confirmation rate of about 17% for the 125,638 chapter 11 cases filed between 1979 and 1986.

Of course, confirmation is not the only indicator of success for a chapter 11 cases. As can be seen in table 5, above, a substantial proportion of chapter 11 cases result in payments to creditors after being converted to chapter 7 or chapter 13. Also, secured creditors often receive sat-

isfaction through filing a motion for relief from the automatic stay, or a motion to compel the abandonment of estate property. During 1988, there were about 195,000 relief from stay motions filed nationwide. Although no statistics are kept on the disposition of these motions, certainly many result in transfer of property from chapter 11 debtors to secured creditors. When relief from the automatic stay is granted in a single asset chapter 11 case (e.g. many real estate cases), there may be no need for confirmation, or even for the filing of a plan of reorganization. No separate statistics are maintained on motions to compel abandonments.

The data from the study also disclosed that the national chapter 11 confirmation rate appears to be rising, as is the total number of confirmations per year. While it is estimated that only 13.3% of the cases filed in 1982 have been or will be confirmed, it appears that approximately 22.4% of the cases filed in 1986 have been or will be confirmed. The following table shows national confirmation rates between 1980 and 1986.

(Table 7.)

ESTIMATES OF CHAPTER 11 CASES CONFIRMED 1979-1986

Filing Year	Total Cases Filed	Projected Number of Pending Confirmed	Number of Closed Confirmed	Projected Future Conf's	Estimate of Total Conf's	Overall Conf. Rate
1979 /80	7,944	683	661	14	1,358	17.1%
1981	10,085	818	605	33	1,456	14.4%
1982	18,915	1,430	991	89	2,510	13.3%
1983	20,351	1,865	904	157	2,926	14.4%
1984	20,311	2,289	681	357	3,327	16.4%
1985	23,408	2,694	889	697	4,280	18.3%
1986	24,624	3,430	295	1,780	5,505	22.4%
Total	125,638	13,209	5,026	3,127	21,362	17.0%

The above table seems to indicate that the chapter 11 process is becoming more effective. It appears that a greater number of the cases filed during 1986 will result in confirmation than the combined number of confirmations for cases filed in 1980, 1981, and 1982.

B. PRESENT AND FUTURE CONFIRMATION RATES:

The Ernst & Young study did not include a review of any cases filed after December 31, 1986. It was thought that too few of these more recently filed chapter 11 cases would have been confirmed when the study was being done (in early 1989). Thus, we can only speculate on the confirmation rate for cases filed since 1987.

Three indicators can be used in making this estimate — past confirmation rates, past total confirmations, and case filing levels. Table 7 indicates that confirmation rates rose steadily between 1982 and 1986. I know of no reason why this trend would not have continued for cases filed after 1986. The Ernst & Young study further revealed that total chapter 11 confirmations increased each year between 1980 and 1986. As noted in Table 1, Chapter 11 filings decreased by about 30% between 1986 and 1988. About one-half of this decrease appears to be attributable to the availability of chapter 12 for family farmers. These farm cases may have had an extremely low confirmation rate when they were filed under chapter 11. (Farm cases tend to have relatively low asset and debt amounts compared to other chapter 11 cases. As noted in Section X, there is considerable evidence that cases where the debtor has a relatively low amount of assets are much less likely to result in confirmation than cases involving substantial assets.)

Based on these three factors, I estimate that the confirmation rate for the chapter 11 cases filed during 1987, 1988, and 1989 will be between 25 and 30 percent. This is

based on the assumptions that total confirmations would not have decreased to the extent that case filings have, and that the recent decrease in chapter 11 case filings was primarily among those cases which were less likely than average to ever get confirmed.

C. CONFIRMATION RATES BY DISTRICT:

Although the national confirmation rate was about 17% for cases filed prior to 1987, the confirmation rate varied substantially from district to district. In the Southern District of New York it is estimated that more than 40% of chapter 11 cases result in confirmation, while in five of the other study districts it is estimated that the confirmation rate for pre-1987 cases is less than 10 percent. Following is the estimate of the overall confirmation rate in the 15 study districts.

(Table 8.)

CONFIRMATION RATES BY DISTRICT

DISTRICT	ESTIMATED CONFIRMATION RATE	MEDIAN TIME FILING TO CONFIRMATION
1.	8.9%	685 DAYS
2.	8.1%	693 "
3.	11.8%	568 "
4.	19.6%	722 "
5.	19.4%	581 "
6.	13.7%	726 "
7.	9.6%	566 "
8.	7.1%	505 "
9.	21.3%	502 "
10.	31.0%	941 "
11.	27.3%	708 "
12.	43.0%	596 "
13.	14.5%	906 "
14.	23.2%	461 "
15.	7.3%	743 "

D. LIQUIDATING PLANS:

The Ernst & Young employees were not instructed to note if a plan was a true plan of reorganization or if it was a liquidating plan. Nevertheless, they did review a number of cases in which the plan contemplated liquidation of the business. The two Ernst & Young employees who visited the most districts and reviewed the most cases estimated that approximately 20 to 30 percent of the cases they reviewed were liquidations rather than reorganizations.

In light of the facts that 17% of chapter 11 cases get confirmed, about one-quarter of these involve liquidating plans, and that some of the reorganizations are not successful, it can be estimated that only about 10 to 12 percent of chapter 11 cases result in an actual reorganization of the filing entity. Further, some of these reorganizations may not be considered fully successful even if the business is reorganized and the creditors are paid. Some reorganized businesses will falter a second time. This may lead to a second chapter 11, a liquidation, or the sale of the business.

V. CONSOLIDATIONS

Frequently, two or more related chapter 11 cases are consolidated for purposes of administration. More often than not, activity in these related cases is entered on a single docket sheet, and they result in a single plan of reorganization. In other instances the related cases may have separate docket sheets and plans, but the related estates can be viewed as a single estate to be administered by the bankruptcy court.

In the Ernst & Young study, the bankruptcy clerks were sent lists of pending cases and asked to determine if they had been confirmed. Where a case had been consolidated with one or more other cases, the accountants re-

viewed the entire consolidated estate, regardless of whether the case on the clerk's listing had been the lead case in the consolidated estate. This methodology resulted in a slight over-representation of consolidated cases in the Ernst & Young study.

MOTION FILED

OCT 16 1995

(2)

No. 95-450

In the Supreme Court of the United States

OCTOBER TERM, 1995

ORIX CREDIT ALLIANCE, INC., PETITIONER

v.

DELTA RESOURCES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR GENERAL MOTORS ACCEPTANCE CORPORATION, FORD MOTOR CREDIT COMPANY, AND CHRYSLER CREDIT CORPORATION AS AMICI CURIAE SUPPORTING PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1995

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ORIX CREDIT ALLIANCE, INC., PETITIONER

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DELTA RESOURCES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MOTION OF GENERAL MOTORS ACCEPTANCE CORPORATION, FORD MOTOR CREDIT COMPANY, AND CHRYSLER CREDIT CORPORATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE SUPPORTING PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, amici respectfully move for leave to file the attached brief in support of petitioner. Petitioner ORIX Credit Alliance, Inc., has consented to the filing of this brief. Counsel for respondent Delta Resources, Inc., has declined to give consent.

Amici bring to bear on this case a perspective somewhat different from that of petitioner, which may be helpful to the Court. Amici are lending subsidiaries of the three leading American motor vehicle manufacturers. Each of them extends credit, in the form of "floor plan financing" on vehicles (manufactured by the parent company or by another supplier) to dealers who sell or lease such vehicles at retail. The manufacturers themselves will not sell vehicles to dealers on credit, but some 70-80% of all vehicles sold through

dealerships are financed by "floor plan financing" provided by lending subsidiaries. Floor plan financing is a multi-billion-dollar business.

In a typical floor plan financing plan – which is common in consumer retailing of durable goods throughout the American economy, not just in the motor vehicle industry – the lender receives no repayment of principal unless and until the dealer sells the collateral (for example, a particular car); the principal is then repaid out of the proceeds of sale. In exchange for those generous terms regarding repayment of principal, the lender retains a "purchase money security interest" in each vehicle under Section 9-107 of the Uniform Commercial Code and requires the dealer to make monthly payments of interest, sometimes referred to in the industry as "floor plan charges."

The decision below holds that, although an oversecured creditor is undisputedly entitled to receive interest under Section 506 of the Bankruptcy Code, 11 U.S.C. § 506, a bankruptcy court may *not* order that such interest be paid to the creditor during the pendency of the bankruptcy case as "adequate protection" under Sections 361 and 362(d) of the Code, 11 U.S.C. §§ 361, 362(d). Instead, the creditor must await the end of the bankruptcy case to receive interest – if, in fact, there is money remaining to pay the accrued interest at the end of the case.

As applied to floor plan financing, that holding would allow a debtor in bankruptcy to cease altogether its payment of "floor plan charges" and accrue a potentially massive interest obligation to the lender while repaying only the principal of loans on motor vehicles as they are sold. Such a result is directly harmful to amici. It also would jeopardize the debtor's own prospects of successful reorganization and the debtor's ability to obtain credit during its bankruptcy case, since the lender's inability to receive *any* recompense for financing millions of dollars worth of inventory during the bankruptcy case will often force the lender to seek relief from the automatic stay in bankruptcy – even if the lender

would otherwise prefer to work *with* the debtor to preserve its going-concern value. Denying commercial lenders the ability (even when they are oversecured) to obtain any interest or financing charges at all during bankruptcy would also necessarily increase the cost of credit for commercial borrowers generally.

Amici believe that the decision below results from a misreading of this Court's decision in *United Savings Association of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988). In light of that fact, and the great practical importance of the question presented, amici will urge the Court to grant certiorari and reverse the decision below, as is more fully explained in the attached amicus brief. Amici therefore respectfully move for leave to file the attached brief in support of petitioner.

Respectfully submitted.

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Counsel for Amici Curiae

OCTOBER 1995

QUESTION PRESENTED

Whether an oversecured creditor, who is undisputedly entitled to postpetition interest under 11 U.S.C. § 506(b), must await the end of the bankruptcy case before receiving such interest, or may instead receive interest payments during the bankruptcy case as part of the "adequate protection" of its interest in the collateral required by 11 U.S.C. §§ 361 and 362(d)(1).

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Warren, *Bankruptcy Policy*, 54 U. CHI.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-450

ORIX CREDIT ALLIANCE, INC., PETITIONER

v.

DELTA RESOURCES, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF GENERAL MOTORS ACCEPTANCE CORPORATION, FORD MOTOR CREDIT COMPANY, AND CHRYSLER CREDIT CORPORATION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The interests of the amici are set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

Section 506(b) of the Bankruptcy Code entitles *over*-secured creditors to interest on their claims. By contrast, the omission of *under*secured creditors from any such entitlement in Section 506(b) led this Court to hold that undersecured creditors may not obtain such interest as "adequate protection" under a related Code provision, Section 362(d)(1). *United Savings Association of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988). The Eleventh Circuit acted inconsistently with the central rationale of

Timbers when it held that oversecured creditors are indistinguishable from undersecured creditors for purposes of Section 362(d)(1) and therefore may not obtain current interest payments as part of "adequate protection." On the contrary, as the leading bankruptcy treatise recognizes, "[e]ntitlement to current payment of such amounts [interest authorized by Section 506(b)] must be grounded * * * in the provision of adequate protection." 3 COLLIER ON BANKRUPTCY ¶ 506.05, at 506-44 (15th ed. L. King 1995).

The practical importance of the Eleventh Circuit's decision cannot be overstated. The decision would jeopardize routine and settled practice in the bankruptcy courts of allowing postpetition interest payments as "adequate protection" and in cash collateral orders designed to aid effective reorganization. In a context with which amici are particularly familiar – dealer bankruptcies in which dealer inventory has been financed by "floor plan financing" involving monthly interest charges but no repayment of principal until inventory is sold – the Eleventh Circuit's decision, by precluding current postpetition interest payments, would lead to more adamant creditor insistence on relief from the automatic stay, dimmer prospects of successful reorganization, an increase in the collateral that lenders will have to demand, and increased interest rates to cover the money lenders will lose as a result of the Eleventh Circuit's rule. Those results, inconsistent with sound bankruptcy policy, justify correction by this Court of the Eleventh Circuit's erroneous decision *before* it is allowed to sow confusion in the lower courts.

ARGUMENT

Section 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b), provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of

> such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

The simple rule stated by Section 506(b), and acknowledged by the court of appeals (Pet. App. A10-A11), is that *over*secured creditors – those who hold security interests in collateral with greater value than the debt the collateral secures – are entitled to postpetition interest payments out of the so-called "equity cushion" or "security cushion." The question this case presents is whether the oversecured creditor must wait until the end of the bankruptcy case to obtain any of the interest payments to which it is entitled, despite Bankruptcy Code provisions guaranteeing the creditor "adequate protection" of its interests during the pendency of the case.

This Court has had frequent occasion in recent years to construe Section 506(b) and related sections of the Code. In several cases, the Court has strongly affirmed the right of *over*secured creditors to receive postpetition interest under Section 506(b).[1] By contrast, when *under*secured creditors claimed entitlement to interest in the form of periodic "adequate protection" payments under Section 361 of the Code, 11 U.S.C. § 361, this Court rejected that approach precisely because it is only *over*secured creditors who, by virtue of Section 506(b), have an entitlement to interest:

> It is true that § 506(b) gives the *over*secured creditor, despite lack of compliance with the conditions of § 552, a similar priority over unsecured creditors; but that does

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[1] *Rake* v. *Wade*, 113 S. Ct. 2187, 2190 & n.4 (1993); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("Recovery of oversecured interest is unqualified."); cf. *Dewsnup* v. *Timm*, 502 U.S. 410, 417 (1992) ("Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the [oversecured] creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.").

> not compromise the principle of § 552, since **the interest payments come only out of the "cushion"** in which the oversecured creditor *does have* a perfected security interest.

United Savings Association of Texas v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 374 (1988) (italics in original; boldface emphasis added).

Notwithstanding this Court's expectation in *Timbers* that interest *payments* would come out of an oversecured creditor's equity cushion, and its emphasis that the superior rights of *over*secured creditors were what rendered inappropriate *under*secured creditors' demands for interest payments as part of "adequate protection," the court below reached the indefensible conclusion that *Timbers* "applies equally well to an oversecured creditor." Pet. App. A16. According to the Eleventh Circuit, this Court in *Timbers* did *not* hold that "adequate protection" payments will differ between oversecured and undersecured creditors; rather, it held that the "adequate protection" guaranteed by Section 362(d)(1)[2] simply *never* includes interest payments. That unprecedented holding seriously misreads *Timbers*, conflicts with accepted

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[2] Section 362(d)(1), 11 U.S.C. § 362(d)(1), guarantees adequate protection to any creditor as a condition of not lifting the automatic stay as to that creditor and allowing that creditor to foreclose on its security interest in property under nonbankruptcy law. It states:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

"Adequate protection" is further explained in Section 361, which provides for several methods of adequately protecting the creditor's "interest in property," including "periodic cash payments."

bankruptcy practice (as reflected in the leading bankruptcy treatise), and could work profound and deleterious alterations in the day-to-day practice of bankruptcy courts.

In *Timbers*, this Court emphasized the "holistic" nature of statutory construction and in particular emphasized the interrelation of Section 362(d)(1) with "other provisions, and the substantive dispositions that they effect." 484 U.S. at 371. By far the most important other provision was Section 506, and by far its most important "substantive disposition" was the *distinction* it drew between undersecured and oversecured creditors:

> Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims—just as it denies *over*secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that "*[t]o the extent that* an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim." (Emphasis added.) Since this provision permits postpetition interest to be paid only out of the "security cushion," the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest.

484 U.S. at 372-373. If Section 506's substantive effect drove the construction of Section 362(d)(1) in *Timbers*, so too must it drive the construction of Section 362(d)(1) in this case – but to the opposite conclusion, since this case involves oversecured creditors who *are* entitled to interest under Section 506, not undersecured creditors who are not.

The Eleventh Circuit thought that the right to *current* rather than postponed interest payments, if it exists, should have been set forth in Section 506(b). Pet. App. A16. That

reasoning, however, misunderstands not only *Timbers* but also the fundamental structure of the Code. Section 506(b) is concerned with substantive rights, not timing of payments. On the other hand, Sections 361 and 362(d)(1) – especially as construed in *Timbers* – *are* concerned with the timing of payments, specifically with ensuring that a creditor either receives "adequate protection" *during* the bankruptcy case or else receives relief from the automatic stay. Thus, as the leading bankruptcy treatise points out:

> It is important to recognize that section 506(b) provides only for the *allowance* of postpetition interest * * * as part of a secured claim. It does not require the current *payment* of such amounts. **Entitlement to current payment of such amounts must be grounded elsewhere, such as in the provision of adequate protection** * * *.

3 COLLIER ON BANKRUPTCY ¶ 506.05, at 506-44 (15th ed. L. King 1995) (italics in original; boldface emphasis added; footnotes omitted). By observing that "adequate protection" under Section 361 can be a source of entitlement to *current* payment of interest (to which Section 506 creates a basic *substantive* entitlement), the Collier treatise flatly contradicts the Eleventh Circuit's sweeping holding that, as a matter of law, "adequate protection" *never* includes current interest payments.[3]

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[3] In its discussion of Section 361, the Collier treatise also makes clear the Eleventh Circuit's error. For one thing, addressing a fact pattern somewhat different from this case (real estate rents) but nevertheless inconsistently with the Eleventh Circuit's sweeping theory, the treatise observes that "adequate protection, at least for an interim period, may consist of a requirement that some portion or all of the rents be applied in a certain manner, perhaps * * * to pay interest." 2 COLLIER, *supra*, ¶ 361.01[1], at 361-7. In addition, in discussing *Timbers*, the Collier treatise correctly understands this Court's rationale to have been "grounded upon the view that to require the payment of interest to the

The propriety of "adequate protection" payments of postpetition interest to oversecured creditors was, until the decision below, settled in the lower federal courts – so much so that it is difficult even to find precedents discussing the propriety of this seldom-questioned practice. Nevertheless, there are reported decisions in which courts have explicitly and advertently provided for postpetition interest payments as part of "adequate protection." *E.g.*, *In re East-West Associates*, 106 B.R. 767, 773 (S.D.N.Y. 1989) (citing *Timbers*). See also American Council of Life Insurance Amicus Brief (collecting cases).[4]

The sea change that the decision below threatens to bring about would have wide-reaching and deleterious effects – ironically, not just for creditors denied interest during the often-lengthy pendency of a bankruptcy case, but also for debtors. Drawing on their own experience, amici will devote the remainder of this brief to explaining the practical con-

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holders of *undersecured* claims would be inconsistent with the wording and purpose of sections 506(b), 552(b), and 362(d)(2) and, in light of that fact, interest may not be paid on undersecured claims in the absence of express statutory authority." *Id.* ¶ 361.01[2], at 361-11 to 361-12 (emphasis added). The treatise likewise recognizes, *id.* at 361-12, that this Court in *Timbers* did not "adopt the language of the court below," whereas the Eleventh Circuit here quoted interchangeably from this Court's opinion and the opinion of the court of appeals in *Timbers*, as if they were equally authoritative. See Pet. App. A13-A14, A15-A16.

[4] In 1984, Congress passed wide-ranging amendments to the Bankruptcy Code, including revisions of Sections 362 and 506(b). See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 441, 448, 98 Stat. 333, 371, 374. Congress made no effort to change the practice, by then routine, of protecting oversecured creditors' interest entitlement during the pendency of a bankruptcy case. That fact strongly suggests that the Code should not now be interpreted to invalidate that practice. See *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975).

sequences of the holding below and its inconsistency with important bankruptcy policies.

An illustrative example using hypothetical numbers may help to focus the discussion. Under "floor plan financing" (which was explained in the attached motion for leave to file this amicus brief), a typical car dealer might at any given time have 200 vehicles on the lot, with an average cost to the dealer of $15,000 and average retail price of $18,000. The total cost of the inventory would be $3 million. If those vehicles were financed by GMAC, Ford Credit, or Chrysler Credit at an interest rate of 8%, the dealer's monthly interest payment (or "floor plan charge") would be 1/12th of $240,000, or $20,000. The dealer, outside of bankruptcy, therefore would pay to the credit company each month that amount, plus the principal of the loans on cars as they were actually sold. The dealer would not pay any amortization of principal.

At the moment of bankruptcy, however, everything changes – if the decision below is correct. The dealer could be required as part of "adequate protection" to continue repaying the principal of the loan on each vehicle as it was sold, but the monthly interest payments would cease altogether. The dealer would be in arrears to the lender by $20,000 after just one month (in addition to any prior arrearages, which might be substantial in a bankruptcy situation), and the arrearage would grow each month. Facing ever-increasing amounts that cannot be collected until the end of a bankruptcy case, potentially many months in the future, lenders will be forced to seek adversarial actions against the dealer – such as lifting of the automatic stay or complete conversion of the bankruptcy case from a reorganization to a liquidation.[5] A debtor will then have a very difficult time obtain-

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[5] See generally *Timbers*, 484 U.S. at 375-376 (encouraging quick relief from stay when there is no good prospect of successful reorganization).

ing the financing necessary to allow it to continue to replenish its inventory as cars are sold.[6] Yet inventory turnover, of course, is the key to success in any retail business. As a result, the business would dwindle, any possible going-concern value would be lost, and little or no money would remain to salvage the business or to pay unsecured creditors.

The situation is different if the lender is assured adequate protection of its "floor plan charges" in addition to repayments of principal. The lender may – and, in amici's experience, often does – find it advantageous to continue something resembling "business as usual" with the debtor, providing financing on a continuous basis for the necessarily rapid turnover of inventory. Doing so may preserve the going-concern value of the dealership, may help the dealer to overcome temporary cash-flow problems that may have given rise to the need for bankruptcy protection (rather than a fundamental long-term inability to run a profitable business), and

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Under 11 U.S.C. § 1129(a)(7)(A)(ii), a plan of reorganization, to be confirmed, generally must provide creditors with at least as much value as they would get in a Chapter 7 liquidation. Creditors who receive no "adequate protection" at all for their interest entitlement during the course of the bankruptcy proceeding will rarely have much prospect of actually receiving full value in a reorganization, since by the time of plan confirmation the money that would otherwise be used to pay the interest due under Section 506(b) will have been put to other uses. So the prospects of successful reorganization will rarely be great if the decision below accurately states the law.

[6] Although the debtor might *agree* with a lender to pay interest on prepetition loans in order to obtain the lender's agreement to provide postpetition financing, other creditors or the bankruptcy trustee might, if the decision below correctly holds that the lender otherwise *cannot* obtain such payments as part of its adequate protection, object to such an agreement on the ground that it will deplete the estate and risk leaving less money for ultimate payment of other debt and the costs of administration of the estate. The decision below thus places a major obstacle in the path of even voluntary agreements to pay interest on a current basis.

ultimately will help the dealer to reorganize. These worthy goals are often pursued through cash collateral orders (see 11 U.S.C. § 363) in dealer bankruptcies. But no lender is likely to lend money to a bankrupt dealer if, by doing so, it cannot collect interest on loans as it is earned. This simply would not be a prudent lending decision. The Eleventh Circuit's decision thus would drastically decrease the prospects of successful reorganization by durable goods retailers.[7]

The decision also would force lenders to demand greater collateral for their loans. At present, a loan on a car or other durable good is typically secured only by the car (or other good) itself. Because interest is paid on a monthly basis, the car (which can be sold for more than the loan principal) is sufficient collateral for the part of the loan that is at some risk. If, however, monthly interest payments cease on bankruptcy – as the Eleventh Circuit's decision contemplates – the lender would watch its collateral quickly disappear: the dealer in bankruptcy would sell the very cars that secured the loans, but would *not* use the excess cash generated by the sales to pay interest[8] (or even save the excess cash for purposes of eventually paying interest, since the Eleventh Circuit has held that the lender's right to interest need receive no "adequate protection" at all). The only rational thing for a lender to do, if faced with collateral that would disappear in bankruptcy and with no other collateral to ensure that there will eventually be funds for the dealer to pay the interest liability, is take a security interest in items other than the vehicles themselves, such as parts, signs, accounts receiv-

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[7] See *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

[8] Under Sections 9-203(3), 9-306, and 9-312(3) of the Uniform Commercial Code, the lender would – outside of the bankruptcy context – have a security interest in *all* the proceeds of the sale, not just the amount necessary to repay the principal.

able, or the franchise itself. If, however, *those* assets become encumbered by security interests of the floor plan lender, the dealer will have fewer assets available to pledge as security for working capital or other credit it may need. The ability of financially weak dealers to run a business at all, thus, will suffer as a consequence of the decision below.[9]

The decision below also threatens to raise the cost of borrowing. In a very significant number of bankruptcies, if the decision below stands and is followed, the debtor will never fully pay the interest it owes to the lender, because that interest has not been – and need not be, according to the Eleventh Circuit – adequately protected during the pendency of the bankruptcy case. At the end of the case (an end probably hastened by the debtor's inability to secure new financing), there often will not be enough money available to pay all of the accrued interest liability. To account for that fact, lenders will simply have to raise the cost of capital to *all* of the dealers to whom they lend (since they will not know in advance which of them will end up in bankruptcy).[10]

Making successful reorganization more difficult, forcing lenders to demand greater collateral, and raising the cost of

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[9] See Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 791 (1987) ("[S]ecured purchase money lender * * * transactions facilitate continued operation of a tottering business, and they are essential if the business is to have a chance to avoid bankruptcy."); *id.* at 791 n.31 ("Secured credit may also be essential to weak businesses and, accordingly, the effects of bankruptcy laws on the role secured credit plays in nonbankruptcy transactions is another important distributional concern. * * * [T]o the extent that security interests do not give unfettered collection rights in bankruptcy, secured creditors are discouraged from relying solely on their security interests for complete protection.").

[10] See *In re Patterson*, 825 F.2d 1140, 1142 (7th Cir. 1987) (Posner, J.) (pointing out that construction of the Code to favor a debtor in a particular case may "hurt the very class sought to be benefited," by "mak[ing] lenders even more reluctant to lend money" on affordable terms).

capital are all undesirable consequences of the decision below, and are results completely contrary to basic bankruptcy policy. The vast majority of all debtors will not benefit, but will suffer, from the decision below. Secured creditors will suffer along with them, as their ability to recover interest is placed in jeopardy and they are forced by circumstance to seek termination of the automatic stay or conversion of the bankruptcy case to a liquidation, even when they would benefit more by working together with the debtor. And unsecured creditors will suffer too, as secured creditors are forced to respond to the decision below by taking greater collateral, leaving fewer unencumbered assets from which unsecured creditors might be paid.

It is a notorious fact, moreover, that most efforts to reorganize under Chapter 11 are *not* successful, and that most cases are converted to liquidations. If there is no obligation to provide adequate protection for an oversecured creditor's Section 506(b) interest entitlement, then the estate by the time of liquidation will rarely have sufficient available assets to pay the accrued interest. The result of the decision below, then, is that the *undisputed* intent of Section 506(b) – to allow oversecured creditors to receive interest out of the "equity cushion" – will often not be fulfilled.

These consequences need not occur. The Eleventh Circuit's serious misunderstanding of *Timbers* and of the Bankruptcy Code can be corrected by this Court *before* it sows confusion in the bankruptcy and district courts.[11]

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[11] This Court does not always await a conflict in the circuits before granting certiorari to resolve issues of bankruptcy law with great practical importance. In *Pennsylvania Department of Public Welfare* v. *Davenport*, 495 U.S. 552, 557 (1990), the Court explicitly granted certiorari "[t]o address a conflict among Bankruptcy Courts." In any event, as petitioner points out, the decision below is inconsistent with *New York Life Insurance Co.* v. *Revco D.S., Inc.*, 901 F.2d 1359, 1365 (6th Cir. 1990).

"The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *Bildisco & Bildisco*, 465 U.S. at 528. The decision below will not assist but will hinder that fundamental purpose by making much more difficult the reorganization of companies that sell durable goods. This Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ORIX CREDIT ALLIANCE, INC.,

Petitioner,

v.

DELTA RESOURCES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF AMERICAN COUNCIL OF LIFE INSURANCE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF AMERICAN COUNCIL OF LIFE INSURANCE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

American Council of Life Insurance ("ACLI") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained and is attached. The consent of the attorney for the respondent was requested but refused.

ACLI is the principal national trade association of the life insurance industry. ACLI's 606 member companies account for 91% of the legal reserve life insurance in this country and are among the nation's largest and most significant commercial lenders. In 1993, life insurance companies' net investment in U.S. capital markets totaled $143.7 billion — ranking third (only after mutual funds and commercial banks) among private domestic capital sources.[1]

The interest of the ACLI as *amicus* arises out of the importance of the decision below to the commercial lending community. That decision categorically holds that bankruptcy courts are precluded, as a matter of law, from ordering payment of postpetition interest as part of the "adequate protection" of an oversecured creditor's "interest in property."

Interest payments, however, are a basic form of adequate protection accorded oversecured creditors in bankruptcy, and often are provided by stipulations allowing bankruptcy debtors to use cash collateral. The national impact and consequences of the decision below, which would bar such payments as a matter of law, are potentially profound.

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[1] American Council of Life Insurance, *1994 Life Insurance Fact Book* 83-107 (1994).

As a principal source of investment capital in the United States, life insurance companies have a broad and important view on the reasons why Supreme Court review is needed here. ACLI's perspective as to the actual, practical effect of the decision below is necessarily more far reaching than that of Petitioner Orix Credit Alliance, Inc., whose petition ACLI supports.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

This brief, in support of the Petition for a Writ of Certiorari, is submitted in accordance with Rule 37 of the Rules of this Court and pursuant to the foregoing motion for leave to file.

INTEREST OF AMICUS CURIAE

The motion of American Council of Life Insurance ("ACLI") for leave to file this brief sets forth ACLI's interest as amicus curiae.

REASONS FOR GRANTING PETITION

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT. SPECIFICALLY, (A) THE DECISION BELOW THREATENS TO UPSET ACCEPTED PRACTICES AS TO CONTINUING PAYMENT OF INTEREST ON OVERSECURED CLAIMS DURING BANKRUPTCY; (B) THE DECISION BELOW IS BASED ON A MISUNDERSTANDING OF THE COURT'S DECISION IN *UNITED SAV. ASS'N V. TIMBERS OF INWOOD FOREST ASSOCS., LTD.*, 484 U.S. 365 (1988), WHICH DEALS WITH ADEQUATE PROTECTION AND PAYMENT OF INTEREST TO UNDERSECURED CREDITORS; AND (C) THE AUTHORITATIVE VOICE OF THE COURT IS NEEDED TO CLARIFY THE MEANING OF *TIMBERS* AND ITS DICTA IN THE CONTEXT OF OVERSECURED DEBT.

I. The Authoritative Voice Of The Court Is Needed To Clarify The Meaning Of Timbers And Its Dicta In The Context of Oversecured Debt.

Discussion of the oversecured creditor's rights to payment of interest accruing postpetition necessarily focuses on *United Sav. Ass'n. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988). *Timbers* held that an undersecured creditor is not entitled to payment of postpetition interest to assure adequate protection of its property interest under § 362(d)(1) of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), 11 U.S.C. §§ 101-1330 (1994). 484 U.S. at 382. However, in far-ranging dicta, the Court also discussed interest on oversecured claims and the concepts and Bankruptcy Code provisions applicable to such claims. *Id.* at 373-74.

Judicial responses to *Timbers'* teaching as to oversecured claims have differed. On the basis of *Timbers*, the decision below holds that an oversecured creditor "as a matter of law, was not entitled to receive periodic payments for accruing postpetition interest as part of adequate protection for any period of time." *In re Delta Resources, Inc.*, 54 F.3d 722, 730 (11th Cir. 1995) (footnote omitted); App. 17.[2] The court of appeals emphasized:

> The *ratio decidendi* enunciated by the Supreme Court in *Timbers* that an undersecured creditor is not entitled to receive postpetition interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1) applies equally well to an oversecured creditor.

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[2] "App." refers to the Appendix to the Petition.

54 F.3d at 730; App. 16. The holding of the court of appeals is not only erroneous but also symptomatic of the pressing need for clarification of *Timbers*.

A. Under Timbers The Right Of A Secured Creditor To Have The Equity Cushion Applied To Payment Of Its Claim, Including Postpetition Interest, Is Entitled To Adequate Protection.

A claim is oversecured when the value of the collateral that secures it is greater than the amount of the claim. Under § 506(b) of the Bankruptcy Code, an oversecured creditor is entitled to postpetition interest as part of its claim. Postpetition interest, however, may "be paid only out of the 'security [equity] cushion,' " i.e., the value of the collateral that exceeds the secured debt. *Timbers*, 484 U.S. at 372. Under *Timbers*, moreover, the equity cushion serves as a limit on the total amount of interest allowable. *Id.*

An oversecured creditor's claim grows postpetition to reflect accruing interest and other charges allowable under Section 506(b). *Rake v. Wade*, ___ U.S. ___, 113 S. Ct. 2187, 2191 (1993) ("[S]uch interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan."). Under the reasoning of *Timbers*, accruing interest is charged against the equity cushion until the cushion is fully consumed. *See* 484 U.S. at 372.

As made clear in *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992), the cushion itself can be created or increased during the course of a bankruptcy case, thereby increasing the amount of a

secured claim.[3] Likewise, the equity cushion can be decreased or eliminated postpetition — by, inter alia, grant of a priming lien (i.e., a lien senior or equal in priority to existing encumbrances) under § 364(d) of the Bankruptcy Code; expenditure of the collateral, if it consists of rents or other cash items; or depreciation. Absent "adequate protection" under the Bankruptcy Code,[4] such invasion of the cushion could eliminate the oversecured creditor's right to postpetition interest.

Since the source of the payment of postpetition interest is the equity cushion, oversecured lenders typically seek to protect the cushion. *Timbers* expressly recognizes that oversecured creditors "*have* a perfected security interest" in the equity cushion. 484 U.S. at 374 (emphasis in original). *Timbers* also states that "the 'interest in property' referred to by § 362(d)(1)

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[3] *Dewsnup* holds that a debtor cannot limit an allowed secured claim to the value of the collateral on the petition date. Rather, "[a]ny increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who have nothing to do with the mortgagor-mortgagee bargain." 502 U.S. at 417.

Although *Dewsnup* was a chapter 7 case, its analysis should govern in chapter 11 as well. *In re Bloomingdale Partners*, 160 B.R. 93, 97 (Bankr. N.D. Ill. 1993). Under 11 U.S.C. § 1129(a)(7)(A)(ii), commonly referred to as the "best interest test," a creditor must recover, under a chapter 11 plan, property worth at least as much as that which would be received in a chapter 7 liquidation. *Bloomingdale*, 160 B.R. at 97.

[4] Adequate protection of a secured creditor's "interest in property" is required whenever the creditor's right to realize the value of its collateral is impaired. See Bankruptcy Code § 362(d) (automatic stay against foreclosure will be lifted if secured creditor lacks adequate protection); Bankruptcy Code § 363(e) (debtor cannot use, sell or lease collateral without adequate protection to lien holder); and Bankruptcy Code § 364(d) (debtor cannot grant priming liens to postpetition lender unless it provides adequate protection to existing lien holder).

[i.e., the interest entitled to adequate protection] includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization." *Id.* at 370. To secure that right, the cushion must be preserved, at least to the extent of anticipated interest and charges.

Both before *Timbers* and after, courts have allowed adequate protection payments of interest, thereby ensuring that oversecured creditors ultimately realize the full amount of their claims.[5] Such protection of the right to have the cushion applied to payment of accruing postpetition interest comports with the legislative history of the Bankruptcy Code, which emphasizes that "adequate

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[5] *E.g.*, *In re Revco D.S., Inc.*, 901 F.2d 1359, 1364-65 (6th Cir. 1990) (granting oversecured creditors interest payments during bankruptcy to protect rights in face of postpetition priming lien); *In re Veeco Inv. Co., L.P.*, 170 B.R. 149, 153 (Bankr. E.D. Mo. 1994) (allowing oversecured creditor to apply adequate protection payments to accrued postpetition interest); *In re Dilts*, 143 B.R. 644, 648 (Bankr. W.D. Pa. 1992) (allowing oversecured creditor to apply adequate protection payments to accrued postpetition interest); *In re McKillips*, 81 B.R. 454, 458 (Bankr. N.D. Ill. 1987) ("The Debtors should pay accruing interest to maintain the cushion."); *In re Mr. D Realty Co.*, 27 B.R. 359, 365-66 (Bankr. S.D. Ohio 1983) (suggesting to debtor that it pay interest as adequate protection to avoid erosion of equity cushion); *In re 5-Leaf Clover Corp.*, 6 B.R. 463, 467 (Bankr. S.D. W. Va. 1980) (holding debtor must at least make adequate protection payments equal to combined depreciation and interest on oversecured debt); *see also In re Pitts*, 2 B.R. 476, 478, 479 (Bankr. C.D. Cal. 1979) ("The existence of an equity, in terms of collateral value in excess of the secured creditor's claim, is an elementary and fundamental part of the transaction" between the creditor and the debtor, entitled to "the structuring of relief calculated to avoid dissipation of whatever protection the cushion affords."). *Compare In re James Wilson Assocs.*, 965 F.2d 160, 171 (7th Cir. 1992) (allowing debtor to use cash collateral where real estate collateral alone worth almost twice as much as unpaid balance of first lienor's mortgage because "[t]he first lienor is entitled to the preservation of so much of his security interest as is necessary generously to secure his claim, but to no more.")

protection" is intended to insure for the secured creditor the benefit of its bargain.[6]

B. Timbers Has Been Interpreted By Some Lower Courts As Requiring Denial of Adequate Protection To The Equity Cushion.

Some courts read *Timbers* to deny adequate protection to the equity cushion. In the decision below, the court of appeals asked whether adequate protection "is designed only to protect against diminution in the value of the collateral," and answered in the affirmative. *In re Delta Resources, Inc.*, 54 F.3d 722, 728 (11th Cir. 1995); App. 12.[7] This approach seems rooted in

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[6] The Bankruptcy Code does not define "adequate protection." *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3rd Cir. 1994) (en banc). Instead, it sets forth examples of "adequate protection" in § 361, which are not intended to be "exclusive or exhaustive." H.R. Rep. No. 595, 95th Cong., 1st Sess. 338-39 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6295. The House Report states as to § 361 in part:

> The section, and the concept of adequate protection, is based as much on policy grounds as on constitutional grounds. Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the bankruptcy laws. Thus, this section recognizes the availability of alternate means of protecting a secured creditor's interest. Though the creditor might not receive his bargain in kind, the purpose of this section is to insure that the secured creditor receives in value essentially what he bargained for.

Id. at 339, 1978 U.S.C.C.A.N. at 6295.

[7] The court of appeals ruled: "[W]e hold the oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only . . . ." 54 F.3d at 730; App. 17.

statements in *Timbers* that the interest to be protected is "the value of the collateral."[8] 484 U.S. at 372. In the oversecured context, however, the value of the collateral is greater than the value of the secured claim. A priming lien which eliminated the cushion (and hence the right to interest) could be imposed without a decline in collateral value. Preservation of collateral value does not protect the oversecured creditor's right to have the full amount of the security applied to the debt as matured, with interest, at plan confirmation (or upon distribution of collateral proceeds).

Other courts find that *Timbers* flatly denies any protection whatsoever to the equity cushion. For example, *In re Lane*, 108 B.R. 6, 10 (Bankr. D. Mass. 1989), takes that position, stressing that the Court in *Timbers* (citing 484 U.S. at 380) rejected the "benefit of the bargain" language in the legislative history of § 361 as a basis for postpetition interest.[9] Still other courts, relying on *Timbers*, express concern that protection of a small cushion through interest payments would allow the oversecured creditor to be paid more than § 506(b) of the Bankruptcy Code allows.[10]

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[8] The decision below states, "The Supreme Court has determined that '[t]he phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.' . . . We think the phrase 'value of such entity's interest' in § 361(1) and (2), when applied to secured creditors, means the same.'" 54 F.3d at 728 (quoting *Timbers*, 484 U.S. at 372); App. 12.

[9] The Court's discussion in *Timbers* of legislative history (484 U.S. at 379-80) did not analyze the significance of such legislative statements in the context of oversecured claims.

[10] *See In re Westchase I Assocs., L.P.*, 126 B.R. 692, 694 (W.D.N.C. 1991) ("Certainly, had the Court or Congress intended that creditors who were only marginally oversecured receive interest payments to maintain their status, which might detrimentally affect undersecured

footnote continued on page 10

In sum, courts read *Timbers* to have conflicting meanings in the context of oversecured claims. The principles of *Timbers*, and how they apply to issues of interest payment and adequate protection of oversecured debt, need definition from the Court.

II. The Decision Below Threatens To Upset Accepted Practices As To Continuing Payment Of Interest On Oversecured Claims During Bankruptcy.

The vice of the decision below is not simply its reading of *Timbers*, but its categorical prohibition, as a matter of law, of interest payments as a form of adequate protection. The court of appeals flatly holds that the Bankruptcy Code "requires that the payment of accrued postpetition interest to an oversecured creditor await the completion of reorganization or confirmation of the bankruptcy case." 54 F.3d at 730; App. 16. Already, the

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footnote continued from page 9

creditors, they could have clearly expressed that intention."); *In re Senior Care Properties, Inc.*, 137 B.R. 527, 529 (Bankr. N.D. Fla. 1992) ("If periodic cash payments were permitted, it is conceivable that, over time, the secured creditor would be paid more than § 506(b) allows, unless, as one court suggests, the payments are taken from the creditor's cushion.") (citation omitted); *see also Lane*, 108 B.R. at 8 (noting that right to postpetition amounts under § 506(b) is subject to surcharge of collateral under § 506(c), which may be considerable and can accrue throughout case).

The answer to this concern is to recognize that "to the extent payments are made prior to plan confirmation, the cushion available to that secured creditor is accordingly reduced." *Senior Care*, 137 B.R. at 529; *accord In re McCombs Properties VI, Ltd.*, 88 B.R. 261, 266 (Bankr. C.D. Cal. 1988) ("[Section] 506(b) requires any payment of interest on a secured creditor's claim during the bankruptcy to be taken from the cushion."). This approach was taken in *In re Broomall Printing Corp.*, where the court refused to disburse the proceeds from a sale of collateral to an oversecured creditor to the extent the proceeds plus already paid postpetition principal and interest exceeded the value of the collateral. 131 B.R. 32, 135-36 (Bankr. D. Md. 1991).

holding below has caused a court to refuse approval of an adequate protection agreement providing for payment of postpetition interest. *In re M4 Enters., Inc.*, 183 B.R. 981, 986 (Bankr. N.D. Ga. 1995).

To understand the actual, practical effect of the decision below, it is best to focus on a typical situation where debt service might continue postpetition by stipulation or court order — a single-asset real estate case where the asset (an office building, shopping center, or apartment complex) generates sufficient rental income to service the debt and pay expenses. The property and the rents are liened to a single lender who is oversecured. The debtor may have filed for relief under chapter 11 because the debt has matured. Quite likely the property cannot be refinanced because (as recently experienced) the market is in upheaval, and the property cannot be sold for the value its income stream warrants without a lengthy exposure to an improving market.

The rents collected, and to be collected, by the hypothetical debtor constitute cash collateral under § 363(a) of the Bankruptcy Code. The debtor may not use the rents for any purpose unless it first obtains the lender's consent or obtains a court order upon proof of adequate protection, as provided in § 363(c) and § 363(e) of the Bankruptcy Code. Because cash (as opposed to any other) collateral is involved, no request from the lender is needed to trigger its adequate protection rights. 11 U.S.C. § 363(c)(2).

In this circumstance, typically, the mortgage lender and the debtor will attempt to negotiate a cash collateral stipulation, whereby interest will continue to be paid and a budget for expenses will be agreed upon. Possible charges against the collateral under § 506(c) of the Bankruptcy Code, such as real estate taxes, typically are reserved for in the budget.

Such cash collateral agreements are salutary. They avoid litigation at the outset of the case over the value of the asset and protection of the property and the rent it generates. In theory, the lender's interest in the net rents could also be protected by depositing them into a special escrow, with the funds left to sit and accumulate for the duration of the case. That is apparently what the court of appeals, in the decision below, believes to be required by the Bankruptcy Code and the Court's decision in *Timbers*, assuming the court of appeals would protect the lender's interest in postpetition rents.

But the fact is that interim interest payments are an accepted form of adequate protection for oversecured creditors. Such payments protect the oversecured lender's right to have the security cushion applied in payment of the debt, simply by using accumulated cash collateral to pay accrued interest. The leading treatise expressly notes payment of interest as a form of adequate protection where rents are involved. 2 *Collier on Bankruptcy* ¶ 361.01, at 361-7 (Lawrence P. King et al. eds., 15th ed. 1995).[11] While adequate protection orders are generally unreported, and often entered by stipulation, numerous reported decisions acknowledge or uphold payment of accrued postpetition interest to oversecured creditors prior to confirmation of a plan. *See, e.g., In re Revco D.S., Inc.*, 901 F.2d 1359, 1364-65 (6th Cir. 1990); *In re Veeco Inv. Co., L.P.*, 170 B.R. 149, 153 (Bankr. E.D. Mo. 1994); *In re Bloomingdale Partners*, 160 B.R. 93, 99-100 (Bankr. N.D. Ill. 1993); *see also* note 5, *supra* (citing cases).

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[11] Even commentators who urge that the equity cushion is not entitled to protection recognize that stipulations to pay postpetition interest are an accepted and salutary practice. "There are many situations in which payments to a creditor as part of an adequate protection arrangement might be described by the parties as interest, rather than as direct compensation for reduced property value." 3 *Chapter 11 Theory and Practice: A Guide to Reorganization* § 16.12 (James F. Queenan, Jr. et al. eds., 1994).

The decision below, relying on *Timbers*, reaches a categorical conclusion which threatens to upset accepted bankruptcy practice as to adequate protection payments to oversecured creditors and to hurt the lending community and the bankruptcy process itself. *Timbers* did not rule on payment of interest as adequate protection of oversecured debt. It set forth broad principles, from which courts dealing with such debt draw fundamentally different conclusions. *Timbers* is in need of authoritative clarification by the Court.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, American Council of Life Insurance, as *amicus*, respectfully submits that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 5, 1995

VIA FEDERAL EXPRESS

David G. Epstein, Esq.
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Re: Orix Credit Alliance, Inc. v. Delta Resources, Inc.

Dear Mr. Epstein:

On Thursday, October 5, 1995 we spoke by telephone, and you advised that Petitioner Orix Credit Alliance, Inc. consents to the filing of an amicus curiae brief by the American Council of Life Insurance in connection with the petition for writ of certiorari in the above-referenced case. Pursuant to the Supreme Court Rule 37, I request that you sign, on the line provided below, to confirm in writing to your consent of the filing of this amicus brief. After you have done so, please return this document to me.

Very truly yours,

Robert B. Millner
Counsel for American Council of Life Insurance

RBM/jll/1193694

CONSENT TO FILING OF AMICUS BRIEF:

By: _____
David G. Epstein, Esq.
Counsel of Record For Petitioner
Orix Credit Alliance, Inc.